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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303.

GALMAR STEAMSHIP CORPORATION,

Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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weight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. • • •

• • •

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

• • •

PART II.

• • •

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, • • •

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or • • •

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise

due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

• • •

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or • • •

• • •

• • • Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

• • • •

ARTICLE 2.15.

• • •

(v) *War Clauses*

• • • •

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contra-

band, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy."

• • •

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured • • •

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

• • •

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; • • •

APPENDIX II.

Pertinent Clauses of the war risk insurance policies, SS. Portmar, Schedule A, Attached to Libel, R. 70-71.

"at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."

* * *

"Only against the risks of war, strikes, riots and civil commotions as per American Form attached."

* * *

"F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

* * *

WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. war-

ranty contained therein but which are excluded by that warranty."

* * *

"Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71, 598, 711-715.

The libel herein was filed on November 15, 1944 in the United States District Court for the Southern District of New York.

The first cause of action claims recovery of the full insured value, $860,000, as for constructive total loss of the *Portmar*, and for additional sue and labor and salvage expenses, all with interest. The second cause of action claims in the alternative for a partial loss.

The War Risk Insurance.

On November 26 and 27, 1941, pursuant to Articles 1.03 and 2.17 of the time charter of the *Portmar*, petitioner obtained war risk insurance on the hull and machinery of SS. *Portmar*, valued at $860,000, on a voyage described in the policies as follows:

> "at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return. to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."
>
> Exhibits 6, 7 and 8; R. 70-71, 598.

The insurance was placed through petitioner's brokers, Mather & Co. of Philadelphia, and their London correspondents, Thos. Stephens & Sons, Ltd. R. 143-144.

Petitioner informed the United States Maritime Commission of the kind and amount of the war risk insurance, and said policies of insurance were approved by the United States Maritime Commission R. 715.

Three policies were issued, that of Lloyds' underwriters in the sum of $714,000; another by seven English companies, members of the Institute of London Underwriters, in the total sum of $116,000; and the third by Excess Insurance Company, Ltd. in the sum of $30,000. R. 710-711.

Said policies insured the *Portmar* against "the risks of war", "all consequences of hostilities or warlike operations", "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations", and contained among others, a Held Covered clause, and the "Free of British Capture (B. C. 2)" rider providing, in effect, that although the underwriters would not be liable for any claim arising from restraint, detainment or requisition, the policy nevertheless, as long as the vessel remained the property of the assured (i.e., was not "condemned"), would cover losses caused by gunfire, bombs, or other implements of war. These provisions among others of the policies, are set forth in Appendix I.

The Charter.

At the time the war risk insurance was written, the *Portmar* was under time charter by petitioner to the United States Maritime Commission for one round voyage described in Article 1.01 of the charter as from "* * * from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports." *Charter,* R. 18-38.

The charter contained, among others, the provisions set forth in Appendix II.

The Special "Held Covered" Agreement of February 6, 1942.

As shall hereafter appear, after the Japanese attack on Pearl Harbor, the *Portmar,* while on a voyage across the Pacific, was diverted under sovereign military orders, without petitioner's knowledge or consent, to the Fiji Islands and thence to Australia. The *Portmar* arrived at Sydney, Australia on December 30, 1941 and was ordered thence to Brisbane, Australia where she arrived on January 5, 1942.

On January 19, 1942, petitioner was first informed unofficially that the *Portmar* was "somewhere in Australia."

On January 24, 1942 after petitioner had received word from its San Francisco office that the *Portmar* was in Australia, petitioner caused Mather & Co. of Philadelphia to send a cable message to Thos. Stephens & Sons, Ltd., as follows:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO"

Exhibit 4, R. 586, 720.

That cable was received on January 26, 1942, was submitted by Messrs. Stephens to the underwriters and was initialed by each of them. R. 586.

On February 6, 1942 Thos. Stephens & Sons, Ltd. sent to Mather & Co. the following letter:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.
>
> "We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your fufther advices."

Exhibit 5, R. 593, 720.

The Voyage.

Prior to sailing on the voyage the Master received from the United States Navy secret written and oral orders as to the positions to be passed on the voyage. R. 715.

Pursuant to Article 1.01 of the charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the

Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government under Article 2.01 of said charter.

On December 7, 1941 at about 8 A. M. when the *Portmar* was then about six hundred miles southeast* of the Hawaiian Islands following the route laid down in the naval orders, the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. R. 716.

The Master thereupon, for the safety of his vessel, turned to a southerly course to avoid the islands and possible capture by the Japanese until further naval orders were received. R. 717.

On December 11, 1941 the Master received orders by radio from the Commandant, Twelfth U. S. Naval District, San Francisco, to proceed to Suva, Fiji Islands and there to receive further instructions from the British naval authorities. The Master of the *Portmar* obeyed said orders and proceeded to Suva, Fiji Islands, arriving there on December 20, 1941. R. 717.

Every move of the *Portmar* from the time she was ordered to Suva, until she was damaged by enemy attack on February 19, 1942, was in accordance with sovereign military orders. R. 718.

At Suva the *Portmar* was ordered by the British Naval Control Officer, with the approval of the local United States Naval commander, to proceed to Sydney, Australia. After arrival at Sydney the *Portmar* was ordered by the Australian Naval Control, with the approval of local officers of the United States Army and Navy, to proceed to various Australian ports and deliver her outward cargo as ordered. The *Portmar* complied with those orders, arriving

* The word "southwest" in the decision of the Court of Appeals below, R. 793, is an error. See 25th Finding of Fact by the District Court. R. 716.

at said ports on the following dates: Sydney, December 30, 1941; Brisbane, January 5, 1942; Port Darwin, January 19, 1942; Wyndham, February 8, 1942; and back to Port Darwin, February 12, 1942. R. 717-721.

From the time the vessel sailed from San Francisco until January 19, 1942, when petitioner received unofficial information that the *Portmar* was "somewhere in Australia", petitioner did not receive any information and had no knowledge of the position or movements of the *Portmar* except that on or about January 17, 1942 petitioner was informed that the U. S. Maritime Commission had arranged the return voyage of the *Portmar* from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720. The master of the *Portmar* repeatedly tried to notify petitioner of the movements of the vessel but military secrecy and controls prevented any communication. R. 281-282; 284-285; 286; 291-293.

On January 24, 1942, after receiving further information that the *Portmar* was in Australia, petitioner and the war risk underwriters entered into the special "Held Covered" agreement shown by the cable message of petitioner's brokers to their London correspondents, dated January 24, 1942 and their reply dated February 6, 1942, quoted *ante*, page 6.

Thus the war risk insurance involved here consisted of the original policies and the special "Held Covered" agreement of February 6, 1942.

At Wyndham the *Portmar* discharged the last of her outward cargo and pursuant to orders theretofore received, returned without cargo to Port Darwin arriving there on February 12, 1942. R. 721.

Thereupon by orders of the officer commanding the United States Army forces at Darwin, the *Portmar* was

directed to discharge all dunnage and take on board a detachment of three to four hundred officers and men of the 148th U. S. Field Artillery with their field guns, military stores, supplies, equipment and ammunition and a motor launch belonging to the Australian Army; and on the night of February 14, 1942 in convoy conference on board the U. S. Cruiser *Houston*, in the presence of and with the approval of the commanding officer of the *Houston*, the master of the *Portmar* and the Masters of three other merchant vessels received orders from the Australian Naval Control officer to proceed in convoy of the *Houston* and other naval vessels for the port of Koepang, Timor. R. 721-722.

Obeying these orders the *Portmar*, sailed in convoy of the *Houston* and other naval vessels from Port Darwin at 1:30 A. M. on February 15, 1942 carrying the artillery, troops and materiel to aid in the defense of Koepang. R. 722.

On the same day while steaming across Timor Sea, the convoy was attacked by two Japanese planes. The *Portmar* did not sustain any damage in that attack. R. 722.

On February 16, 1942, while still proceeding across Timor Sea, the convoy was attacked by a squadron of Japanese bombers. The *Portmar* sustained some damages in that attack but was nevertheless able to proceed. On orders of the Commander of the *Houston* the convoy returned to Port Darwin and anchored there at 12.55 P. M. on February 18, 1942. The *Portmar* then received orders to await her turn at a specified discharging berth, and upon reaching her turn, to dock and discharge her military supplies, equipment and personnel. R. 723. At the time of the enemy attack which occurred on the following day there were no other military orders as to her future movements. Her

return voyage had been arranged by the U. S. Maritime Commission for a cargo of chrome ore from New Caledonia for Philadelphia. R. 142-143; 796-797.

The Disaster.

On February 19, 1942 at about 9:55 A. M., Japanese aircraft attacked Port Darwin. In that attack, the *Portmar* was riddled and shattered by bomb fragments and aerial gun fire. R. 309-320. The damages sustained by the *Portmar* were so extensive and serious that the Master beached the vessel in order to prevent her from sinking in the deep water of the harbor. R. 320; 724.

Constructive Total Loss.

As the *Portmar* lay beached in the upper harbor of Port Darwin on February 19, 1942 she was a constructive total loss. The United States Naval observer at Melbourne reported to the War Shipping Administration that he did not believe the *Portmar* could be salvaged as a cargo carrier but might be as a hulk or floating store. R. 606.

The Japanese dominated the sea and the air. There were no salvage or repair facilities whatever at Port Darwin. No private shipowner or commercial salvor could have obtained the necessary pumps or other salvage equipment. R. 350, 355-357, 496, 506-507, 730. The District Court found that petitioner "could not have arranged to retrieve and restore her to pre-disaster condition". R. 735.

The nearest port at which any repairs, however temporary, could have been attempted was Brisbane, two thousand miles away. The nearest drydock large enough to accommodate the *Portmar* was at Sydney, twenty-five hundred miles away. R. 355-356, 358, 730, 732-733. No private or commercial arrangement could have been made for the

towage of the *Portmar* to Brisbane or Sydney, or for repairs at such ports. R. 736-737.

The United States Navy had abandoned Port Darwin and moved to the Exmouth Gulf, fifteen hundred miles to the southwest. The Cape York Peninsula was evacuated except for a small detachment of about fifty American soldiers. A defense line had been set up fifteen miles north of Melbourne on the south coast. The Japanese held the Tanimbar Islands, only 300 miles away. R. 731-732. The *Portmar* was in imminent peril of actual total loss by Japanese invasion of northern Australia and such an invasion was expected at any moment. R. 730.

In the judgment of the Master and Chief Officer after the vessel was beached, salvage, repairs and restoration to her former condition was impossible, and if in any way it could be accomplished, the cost would have been out of all reason, far in excess of the value of the vessel. R. 350, 355-357, 496, 506-507, 730.

She was still a constructive total loss on April 8, 1942, even though, unknown to petitioner or the master (R. 733), by that date she had been floated by the military authorities and lay at anchor in the harbor. She was kept afloat only by salvage pumps. Except for some temporary patches the damages were unrepaired. R. 732-735.

Notice of Abandonment.

Promptly after receipt of information of the extent of the loss, petitioner on April 8, 1942, through its brokers, tendered to the war risk underwriters abandonment of its interest in the *Portmar*. On the same date, the tender of abandonment was rejected by the war risk underwriters. R. 587-589.

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303.

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 197 F. 2d 795 and appears at pages 792-802 of the record. The endorsement and order

denying the petition for rehearing will be found at pages 820-821 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

JURISDICTION OF THIS COURT

This Court issued writ of certiorari on October 20, 1952.

The jurisdiction of this Court rests upon the provisions of Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED*

1. Whether war risk underwriters of a cargo vessel, who have issued in the face of impending war a policy covering, among other things, "the risks of war" and "all consequences of hostilities or warlike operations", are relieved of liability under said policy for damage to the vessel by enemy attack, solely because of frustration of the voyage by sovereign orders in a distant war area, of which the insured owner has not any knowledge, when the policy contains an express provision that notwithstanding such restraint, the insurance would cover damage by gunfire, bombs or other implements of war, and where the underwriters specially agreed, after the date on which the frustration is held to have occurred, and with knowledge that

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* In the petition for writ of certiorari herein, petitioner reserved for submission to this Court the following questions on the merits which were decided in petitioner's favor by the District Court, and on which the Court of Appeals did not make any decision:

(a) Whether, despite any other event, the war risk insurance policies were in effect at the time of the loss on February 19, 1942.

(b) Whether the losses sustained by petitioner with respect to the *Portmar* were covered by the policies even in the absence of, but certainly in view of, the "Free of British

the vessel had been diverted by government orders into a zone of military control, to hold the vessel covered.

2. Whether the voyage specified in a time charter and in the policies of war risk insurance of a vessel is frustrated as a fact, or is to be held frustrated as matter of law, by reason of governmental orders to, or military restraint of, the vessel, where the time charter contains provisions anticipating such orders and restraint and providing that in such event anything done or not done shall not be deemed a deviation, and where the war risk insurance policies contain a provision that notwithstanding such event, damage to the vessel by enemy attack shall remain covered.

Statement of the Case

This is a suit by Calmar Steamship Corporation, a Delaware corporation, owner of the American cargo steamship *Portmar*, against British war risk underwriters of the vessel for recovery under the policies of war risk insurance of the *Portmar* by reason of damage sustained by the vessel in Japanese aerial attacks in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

(c) Whether the *Portmar* was a constructive total loss within the provisions of the war risk policies.

(d) Whether petitioner's tender of abandonment was sufficient.

Petitioner also reserved the question raised but not decided below, whether underwriters are barred from raising any defense other than that specified in the repudiation letter of January 8, 1943 (R. 590-591), by the decision of this Court in *Ohio & M. R. Co.* v. *McCarthy* (1877), 96 U. S. 258, 267-8.

Questions (a) and (b) are discussed in the First Point hereof.

Question (c) is discussed in the Third Point hereof.

Question (d), and other defenses waived by the underwriters (*Ohio & M. R. Co.* v. *McCarthy, supra*), are discussed in the Fourth

Salvage.

The *Portmar* was floated on April 5, 1942 on orders of the American military authorities, with the cooperation of the Australian government, by means of pumps sent overland 2,000 miles from southern Australia. R. 732-735.

The Battle of the Coral Sea occurred May 4-9, 1942. That naval victory relieved to some extent the eastern coast of Australia and made possible a military attempt with men chosen for a dangerous mission, to tow the *Portmar* from Port Darwin to Brisbane. R. 197, 736. There was no possibility of obtaining any naval escort in the waters still dominated by the Japanese west of the Torres Strait.

The tow began from Port Darwin on about June 25, 1942, and made a long detour around Melville Island and through the Gulf of Carpentaria, following the shore line, running only by night and hiding in coves by day. Until they rounded Cape York and got down off the Queensland Coast, they made their way in darkness through waters completely dominated by the Japanese. R. 736.

The tow arrived at Brisbane on or about July 29, 1942. R. 385. The Army had, and retained, complete possession and control of the vessel. R. 737. Thereafter the Army authorities at Brisbane accomplished certain preliminary cleaning of the *Portmar* and certain makeshift and patch-work repairs. R. 208-209, 738.

The Requisition of Title by the United States.

On November 17, 1942, at 12 noon, Eastern Australian time, the United States, acting by and through the War Shipping Administration, requisitioned title to SS. *Portmar* at Brisbane, Queensland, Australia. R. 738.

After said requisition and after the patch-work repairs performed by the Army had been completed, the vessel

moved to Sydney where she was placed on drydock. Some additional repairs were made there. R. 738.

The *Portmar* was never restored to her condition and insurance classification before the loss. R. 195-196, 738.

Thereafter, the *Portmar* made two or three trips for the United States Army and then was sunk by a Japanese torpedo. R. 739.

Underwriters' repudiation of liability.

On January 8, 1943 the war risk underwriters informed Thos. Stephens & Sons, Ltd., London that after careful consideration they declined all liability under the policies, on the ground "that all liability under their policies had terminated prior to the casualty." That repudiation was transmitted to petitioner by letter, initialed by all the respondent underwriters, from Thos. Stephens & Sons, Ltd., London to Mather & Company, Philadelphia, dated January 8, 1943. R. 590-591; 740-741.

Historical Facts.

Petitioner requests that this Court take judicial notice of the historical facts set forth in Appendix III.

The Decisions Below.

The District Court held that petitioner was entitled to recover from the underwriters the insured value of the *Portmar*, $860,000 with sue and labor expenses and the amount expended to satisfy a judgment for salvage award, all with interest. The District Court held that the policies were in effect at the time of the loss; that the loss was covered by the policies and that the vessel became a constructive total loss within the meaning of the policies by reason of a peril insured against; that petitioner is not precluded from recovery under the policies; that petitioner's tender

of abandonment to the war risk underwriters was sufficient. R. 744-756. Final decree was entered on July 20, 1951 in favor of petitioner in the total sum of $1,390,471.05. R. 765-768.

On appeal by respondents, R. 772-776, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and directed that the libel be dismissed, holding that the voyage ended when the *Portmar* arrived at Brisbane on January 5, 1942, by reason of frustration due to the military dominion and controls then existing under the emergency in Australia, and that the policies then ceased to cover the ship. R. 802.

The Court of Appeals completely ignored the special "Held Covered" agreement of February 6, 1942.

Petitioner filed a petition for rehearing based on the special "Held Covered" agreement of February 6, 1942, *ante*, page 6, and the "Held Covered" clause of the policies, quoted *post*, pp. 26-27. R. 806-818. The petition was denied. R. 820-821.

Specification of Errors

The United States Court of Appeals erred—

1. In holding that the war risk insurance of the *Portmar* terminated before the loss, even though a frustration of the round voyage of the *Portmar* occurred.

2. In failing to enforce the declared intent of the parties as shown by the specific provisions of the war risk insurance policies.

3. In granting to the war risk underwriters a release from liability by implication of an intent not to cover the loss which occurred.

4. In failing to apply the principles stated by the House of Lords in *Rickards* v. *Forestal Land etc. Co., Ltd.* [1942] A. C. 50 despite the admonition of this Court in *Queens Ins. Co. of America* v. *Globe & Rutgers Ins. Co.* (*The Napoli*), (1924) 263 U. S. 487 and recently in *Standard Oil Company of New Jersey* v. *United States of America* (*The John Worthington*), (1950) 340 U. S. 54.

5. In failing to give any effect to the special "Held Covered" agreement to hold the *Portmar* covered entered into between the petitioner and the war risk underwriters, on February 6, 1942.

6. In holding that the round voyage of the *Portmar* was frustrated before the loss occurred on February 19, 1942.

Summary of Argument

1. *The war risk insurance policies continued in effect and covered the loss.*

The war risk insurance of the *Portmar* was against "the risks of war" and "all consequences of hostilities or warlike operations" and "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations".

The policies contained a frustration clause quoted *post*, pp. 21-22, which contemplated that the voyage might be frustrated but did not contain any provision that the policies would come to an end in such event.

The policies contained a "Free of British Capture B. C. 2" rider quoted *post*, page 22 which specifically provided insurance for damage and consequent losses by reason of enemy attack, even though, at the time of the loss the vessel was under restraint, detainment or requisition.

In addition, there was a special agreement between the assured and the underwriters on February 6, 1942 that the *Portmar* would be held covered, after it was known, and the underwriters were informed, that the *Portmar* had been diverted to Australia on outward voyage under Government orders. *Ante*, p. 6.

On a claim in contract, and especially on an insurance contract, the declared intent of the parties controls. The policies contained clauses explicitly covering the loss. See the B. C. 2 rider, quoted *post*, p. 22, and the "Held Covered" clause quoted *post*, pp. 26-27.

If a vessel is forced to depart from the specific voyage described in a policy, or if the voyage be changed, without consent of her owner and master, not to mention that such events occur without even the knowledge of the assured, the underwriters are not discharged. See cases cited *post*, pp. 38-39.

The decision of the Court of Appeals below is in direct conflict with the decision of the House of Lords in *Rickards* v. *Forestal etc. Co., Ltd.*, [1942] A. C. 50, where the underwriters were held liable for loss of the goods notwithstanding that the voyage had already been frustrated, and that the vessels were changed into enemy blockade runners.

The risks of the voyage to the Philippines as prescribed by the policies were not increased by the diversion to Australia after the Japanese attack on Pearl Harbor, or by any of the events which occurred in Australia prior to the loss.

2. *The round voyage was not frustrated before the loss occurred.*

The voyage of the *Portmar* was not frustrated because the provisions of the charter under which the *Portmar* was engaged on the round voyage, explicitly anticipated and provided for the effect of any deviation or restraint by rea-

son of Government or military controls. See Articles 2.04, 2.15 and 2.27, Appendix II.

None of the decisions cited by the Court of Appeals in charter frustration cases, apply to the present case because they did not involve contract provisions such as are found here.

The parties to the charter, viz., petitioner and the United States Maritime Commission, treated the voyage and the charter as continuing in effect until information was received as to the extent of the disaster.

The test, as stated by the Court of Appeals below, R. 800, is the position at the time of the alleged frustration. On January 5, 1942 and thereafter until the loss on February 19, 1942 there were not any orders with respect to the *Portmar* which indicated that the vessel would not be allowed to complete her round voyage within a reasonable time. The question of frustration should not be determined by hindsight or subsequent events.

3. *The damages sustained by the vessel constituted a constructive total loss.*

The damages inflicted by the enemy attacks on the *Portmar* in the Timor Sea on February 16, 1942 and at Port Darwin on February 19, 1942 made her a constructive total loss, and she so remained on April 8, 1942 when petitioner tendered abandonment to the underwriters. Because of the domination of the sea by the Japanese Navy and of the air by the Japanese Air Force, the *Portmar* was in imminent peril of actual total loss. R. 731-732; 735-736. Further, it was impossible for the petitioner or any commercial salvor to have raised and recovered the vessel and towed her to Brisbane, two thousand miles away, the nearest port where any repairs, however temporary, could be

undertaken. There was not any salvage equipment at Port Darwin. Any salvage or towage or repairs could be accomplished only through the power of the Australian and American military authorities. Imminent peril of actual total loss, and impossibility of recovery and repair are recognized grounds for abandonment as for a constructive total loss. See authorities cited *post*, pp. 54-57.

In addition, the *Portmar* was a constructive total loss after the attack on February 19, 1942 and on April 8, 1942, because of the high probability that the cost of recovering and repairing the *Portmar* would exceed the insured value.

4. *Added defenses of the underwriters should be overruled.*

The underwriters have put forward defenses to the effect that petitioner is precluded from recovery *even though the policies were in effect at the time of the loss*, because—

(a) the *Portmar* was converted to a troop-ship on an independent voyage;

(b) the *Portmar* was deliberately exposed to risk of loss;

(c) the tender of abandonment was defective in that the consent of the United States Maritime Commission thereto was not first obtained.

Such defenses were not set forth in the repudiation letter of January 8, 1943 by which the underwriters declined all liability under these policies on the specific ground that the policies *were not in effect at the time of the loss*. Accordingly, such defenses should be overruled. *Ohio & M. R. Co.* v. *McCarthy* (1877), 96 U. S. 258, 267-268.

On the merits, the afterthought defenses of the underwriters should all be dismissed.

Even though the *Portmar* was "converted to a troopship on an independent voyage", in the abortive expedition toward Timor, it was involuntary on the part of the petitioner and the Master of the vessel, and without the knowledge of the petitioner, and thus, under the authorities, cited *post*, pp. 38-39, the policies remained in effect.

The *Portmar* was not "deliberately exposed to risk of loss". She was given every possible protection, and there was no causal relation between the service in which she was engaged and the loss. The *Portmar* received almost all the damage for which this suit is brought while lying at anchor in the harbor at Port Darwin after return from the Timor expedition, where she would have been if she had never sailed for Timor at all, but remained at Port Darwin. The nature of the cargo on board had nothing to do with the general attack that the Japanese aircraft made on all shipping at Port Darwin on February 19, 1942.

The tender of abandonment made by petitioner to the underwriters on April 8, 1942 was in all respects valid. It was not necessary that the consent of the United States Maritime Commission be obtained to a tender of abandonment. Having rejected the tender of abandonment, petitioners were excused from the useless act of obtaining consent of the United States Maritime Commission even though such consent were necessary.

FIRST POINT.

THE WAR RISK INSURANCE, BY THE TERMS OF THE ORIGINAL POLICIES AND THE SPECIAL "HELD COVERED" AGREEMENT OF FEBRUARY 6, 1942, CONTINUED IN EFFECT AND COVERED THE LOSS EVEN THOUGH THE VOYAGE HAD ALREADY BEEN FRUSTRATED.

(a) *The form of the policies.*

As already stated, the war risk insurance of the *Portmar* was against "the risks of war" and "all consequences of hostilities or warlike operations" and "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations".

The insurance of the *Portmar* was on the voyage specified, but it insured only the safety of the vessel, not the completion of the adventure.

In *Alexander* v. *Baltimore Ins. Co.* (1808) 4 Cranch. 370, 374 Chief Justice Marshall said: (italics ours)

> "* * * They (the underwriters) insure her ability to perform her voyage, *not that she shall perform it.*"

See also Mr. Justice Story in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, 401 and *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, at pages 69-70 and 90-91. In the insurance of goods, the insurance is both against loss of the goods and against loss of the adventure unless the latter is excluded by the frustration clause. But the underwriters of the safety of a vessel are not concerned with and are not liable for the loss of the adventure. The inclusion of the frustration clause in hull policies makes that doubly clear. The Court of Appeals herein recognized that it does not apply to loss of the ship, but only to loss of the voyage. R. 798.

The war risk insurance policies of the *Portmar* did not refer to the charter, although the underwriters were informed that the *Portmar* was under charter to the U. S. Maritime Commission for the proposed voyage. R. 262.

The war risk insurance of the *Portmar* was written on the familiar form of a marine policy with an F. C. & S. Clause or warranty which excluded any claim for loss resulting from capture, seizure, and other causes including "all consequences of hostilities or warlike operations", with a war risk endorsement, the first of the War Risk Clauses of the present policies, covering all risks excluded by the F. C. & S. Clause from the marine policy. *Policies*, Exhibits 6, 7, and 8, R. 70-71. The pertinent clauses are set forth in Appendix I hereof.

This Court dealt with war risk insurance in similar form in *Standard Oil Company of New Jersey* v. *United States* (*The John Worthington*), (1950) 340 U. S. 54.

There is no question in this case that the loss was due to a cause covered by the terms of the policy if the policy was in effect at the time of the loss. The question of causation before this Court in *The John Worthington* is not here involved because the *Portmar* was damaged on February 19, 1942 by the direct attack by Japanese aircraft in the harbor of Port Darwin, Australia.

The decision below was that "* * * the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. * * *" R. 793.

Among other provisions the War Risk clauses of the present policies contained the following clauses:

> "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure

caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71, 598, 711-715.

For convenient reference, we shall call the first clause above quoted the "frustration clause"; and the second, sometimes called the "Free of British Capture clause", the "B. C. 2 rider" according to the letters at the end of its text.

It is petitioner's position that the clauses above quoted show that the parties anticipated a frustration or detainment of the voyage but did not intend that thereupon the policies would come to an end, because they did not say so, although it might easily have been so stipulated while the attention of the parties was on that subject.

The frustration clause provided only that no claim might be made for frustration of the voyage.* The force of the maxim *expressio unius, exclusio alterius* is inescapable, and the Court of Appeals could not avoid reference to it. R. 798.

It is conceded that the B. C. 2 rider was in common use. *Colloquy,* 228, 231. It was promulgated by the American Institute of Marine Underwriters, and used in other risks placed with Lloyds and the English companies during the period 1940-1945. *Grotefend,* R. 264-265.

The B. C. 2 rider specifically preserved and continued in effect the insurance of the vessel against loss by enemy attack notwithstanding that an arrest, restraint, detainment or requisition of the vessel had already occurred.

The unqualified language of the B. C. 2 rider bars the implication of an intent to terminate the policies on the occurrence of an event clearly provided for therein. So far from providing for termination of the policies, the underwriters agreed to continue the cover in any contingency named, provided that the vessel was not "condemned". That condition was fulfilled. The District Court found that the vessel was not condemned. R. 749.

The District Court rightly held that the losses for which petitioner claims were covered by the terms of the war risk policies in suit without any reference to the rider. R. 749.

The B. C. 2 rider did not constitute the insuring clause of the policies. It preserved and continued the insurance, otherwise contained in the policies, in effect notwithstanding the occurrence of one of the events stated.

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* The warranty excluding claims for loss of or frustration of the insured voyage was adopted in 1919 to avoid the liability imposed on underwriters in the insurance of goods in *Sanday & Co. v. British and Foreign Marine Ins. Co.* [1916] A. C. 650.

The underwriters endeavored below to avoid the effect of the B. C. 2 rider by distorting its obvious meaning and declared intent and by offering evidence to show that it meant something entirely different from what it plainly says. Their contentions in that respect betray their fear of its effect.

The meaning of the rider may be stated as follows:

> *"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from * * * Restraint, Detainment, Requisition * * * by or under the authority of the government of Great Britain or any of its dominions * * * or allies * * *"*

Petitioner has not made any claim against these underwriters arising from the restraint, detainment or requisition of the *Portmar*. The only claim in this suit arises from the damage sustained by the *Portmar* by enemy attack. But if it be suggested by the underwriters that because the damage occurred "during" restraint or requisition by the sovereign, the present claim is therefore "arising from" such restraint or requisition, the answer is that the further language of the rider preserves such damage from any exclusion by the first clause of the rider.

> *"* * * but unless the insured Vessel is condemned * * *"*

The *Portmar* was never condemned. R. 749.

> *"* * * this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war * * *"*

Petitioner's losses were "otherwise covered by the policy." See the terms "the risks of war"

which will be found on the face of the policies; "all consequences of hostilities or warlike operations" which are among the exclusions of the F. C. & S. Clause of the policies and which are assumed by the first paragraph of the War Risk Clauses; and "risks" of military or naval aircraft and/or engines of war * * * and warlike operations" which are contained in the amendment of the Adventures and Perils Clause as provided in the third paragraph of the War Risks Clauses contained in the policies. R. 798.

"* * * *provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.*"

The damage sustained by the *Portmar* by enemy attack, and the stranding necessitated by such damages, were clearly excluded from the marine policy by the words "all consequences of hostilities or warlike operations" contained in the F. C. & S. Clause, and as so excluded were covered by the first paragraph of the "War Risk Clauses."

The decision of the Court of Appeals recognized that petitioner's contentions as to the effect of the B. C. 2 rider have "literal plausibility" R. 797-8. Thus the Court below conceded that petitioner's claim for the loss of the *Portmar* was at least within the letter of the policies.* The

* It was contended by the Underwriters below that the words "otherwise covered by this policy" mean only "in the absence of restraint, detainment or requisition." In other words, it was contended, and may be suggested here, that the B. C. 2 rider covered enemy attack and consequent stranding only if no arrest or restraint was in effect at the time. The fallacy of that contention is sharply shown by the testimony of their own witness, Winter, whom the underwriters called for testimony as to the "intent" of the draftsmen of the rider. His testimony was wholly inadmissible because the rider is concededly clear and unambiguous. R. 108, 746, 747-748. But it may be noted that Winter said that the intent was to

search for "intent" because the Court "could not believe" (R. 802) what the language of the policies says, confesses the force of the claim that the loss was within the provisions of the policies.

(b) *The "Held Covered" Clause contained in the original policies precludes any finding that the insurance terminated before the loss.*

In addition to the clauses above mentioned, the war risk clauses of the policies contained another clause which provided that the vessel would be "held covered" even in the event of "deviation or change of voyage", as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured

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cover damage or loss while the vessel was under detainment by friendly powers for control port examination, Winter, R. 251. Thus he conceded at least that the intent was to cover losses which occurred not *in the absence of* restraint, detainment, etc. but *during* a restraint, detainment, etc.

Further, the underwriters' interpretation of the words "otherwise covered by this policy" makes the whole second clause of the rider redundant, for if their contention were sound, there was no need of it. All losses occurring *in the absence* of capture, seizure, requisition, etc., are covered by the war risk endorsement without reference to the B. C. 2 rider. It is plain that the word "otherwise" should be taken as used in its ordinary meaning, as "in other respects", and that here it means "but for this warranty", as if the foregoing warranty were not in the policy.

As to the "intent of the parties", the evidence offered by the underwriters was limited to what the Policy Form Committee of the American Institute of Marine Underwriters thought as to the meaning of the B. C. 2 rider and had in mind in its preparation. *Winter*, R. 250-251. No evidence was offered by the underwriters as to what shipowners understood that it meant. It is settled by this Court that if there is ambiguity, the intent of *both* parties must be sought. *Reed* v. *Insurance Co.* (1877), 95 U. S. 23. The District Court rightly disregarded all the evidence offered by the underwriters as to the "interpretation" of the rider, because the Court found that the rider was clear and not ambiguous. R. 747-748, 750.

and/or their managers and an additional premium paid if required."

Petitioner has not made any claim under the "Held Covered" clause, because it does not apply where the diversion is under compulsion of sovereign control. That clause was designed to cover a situation where the vessel *voluntarily* deviates from the voyage specified in the policies or where there is a *voluntary* change of voyage. It prevents the termination of the insurance protection even in case the vessel may without excuse depart from the limits of the voyage specifically described in the policy.

We have never contended that the present policies were continued in effect solely by virtue of the "Held Covered" clause, because it does not apply to a situation, and is unnecessary, where the deviation or change of voyage is *involuntary on the part of the assured. Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, 82-83, 109-110. Compare Section 46 of the British Marine Insurance Act, 1906, with Section 49-(1)-(b) and (d) of the same Act.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect, even where deviation or change of voyage occurred with the consent of the assured, then *a fortiori* the insurance should be held to continue in effect if a deviation or change of voyage occurs *without the consent or control of the assured.**

When the Court below said that petitioner's contention, although having "literal plausibility", overlooks the fundamental subject matter of the insurance, i.e., "the *Portmar*

* Even though the "Held Covered" clause of the policies applied, and an additional premium were due, the rate should not exceed 6½%, the rate quoted by the American Syndicate effective February 15, 1942. R. 656, also Exhibit 54 in Exhibit Volume separately submitted.

on the prescribed voyage" R. 798, the Court, in turn, overlooked the force of the "Held Covered" Clause and the explicit contemplation of government interference and control which might force the vessel, without the consent of the assured, to depart from the voyage specifically described at the head of the policies. What is the meaning of the term "prescribed voyage" as used by the Court of Appeals below? We submit that the prescribed voyage is not limited to direct passages between the termini described in the opening paragraph of the policy but under the decisions cited, post pp. 38-39, includes any deviation or change of the voyage which are forced upon the insured vessel against the consent of the Master or of the assured and even without the knowledge of the assured. The "Held Covered" clause goes even further, because it preserves the cover even though the deviation or change of voyage is voluntary on the part of the assured.

The decision of the Court of Appeals below "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802) is wholly incompatible with the express provisions of the "Held Covered" clause.

(c) *The special "Held Covered" agreement of February 6, 1942.*

In addition to the provisions of the policies and the effect of the authorities later cited, there are certain uncontroverted facts which should have precluded any such treatment of the case as is found in the opinion below. Here we refer to petitioner's cable message to the underwriters of January 24, 1942, and the underwriters' acquiescence, as stated in the letter from Stephens & Son of London, of February 6, 1942, both quoted *ante*, page 6.

The decision below, ignoring that specific agreement to hold the vessel covered, holds that petitioner was stripped of its war risk insurance by events which were beyond its control, consent and knowledge, (R. 157, 718-719, 721); and that after January 5, 1942 it was uninsured against the disaster that occurred by enemy attack on February 19, 1942 even though the underwriters had agreed on February 6, 1942 that the diversion of vessel to Australia on outward voyage, under government orders would be held covered "pending further advices".

No further information as to the movements of the vessel was received by petitioner until after the disaster.

On February 19, 1942 (New York date) petitioner received a letter from the Maritime Commission to the effect that the *Portmar* arrived at Darwin on February 12, 1942. R. 145-146. The enemy attack on the *Portmar* had already occurred (Australian date). The next word came on February 23, 1942 when I. M. Holt of the War Shipping Administration telegraphed petitioner that the *Portmar* had been reported through British channels to have been damaged in an air raid at Port Darwin. R. 734. Thus no "further advices" could be given by petitioner to the underwriters before the loss.

The uncontroverted evidence of that cable message and letter were called to the attention of the Court in brief and argument. They were not mentioned in the opinion of the Court of Appeals below, and were therefore set forth and again called to the attention of the Court in the petition for rehearing. R. 806-811.

Petitioner did everything that a prudent shipowner could do to place war risk insurance which would be coextensive with the time and area of the vessel's employment under the time charter, by insuring the vessel not only for the voyage specifically described in the charter, but also

> voyage or adventure. Its language cannot, in my opinion, be twisted to make it exclude a claim for actual loss of or damage to the goods themselves. Even if I felt any doubt about this, which I do not, *I should still say that it is for an underwriter who has undertaken a particular insurance, if he desires to make exceptions from it, to do so in clear terms. An ambiguous exception is no defence. However, I do not think the exception is even ambiguous.*"

The British underwriters herein, with generations of experience and world-wide sources of information, signed the slips which originated the present war risk insurance on November 26th and 27th, 1941, in full contemplation of the explosive situation then developing in the Pacific. *Slips,* R. 584-5; *Historical Facts,* appendix III.

Section 18-(3)-(b) of the British Marine Insurance Act, 1906, declares that the insurer is presumed to know matters of common notoriety or knowledge.

In *Buck* v. *Chesapeake Ins. Co.* (1828), 1 Pet. 151 at page 160 this Court said:

> "* * * A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. * * *"

Proctor for the underwriters conceded on the trial that the language of the B. C. 8 rider was clear and unambiguous. R. 108. The expert witness Winter called by the underwriters at the trial as to the interpretation of that rider agreed that it was unambiguous. There are no "words of art" in it which require construction. R. 246.

The District Court found that the B. C. 2 rider is not ambiguous. (R. 747) and that its meaning is clear. R. 748. The Court of Appeals did not make any finding to the contrary.

In the absence of ambiguity the only question before the Court is the meaning of the rider as declared by its language.

> *Home Ins. Co.* v. *Baltimore Warehouse Co.*, (1876) 93 U. S. 527, 541-542;
> *Calderon* v. *Atlas Steamship Co.* (1898), 170 U. S. 272;
> *United States* v. *Choctaw, etc. Nations* (1900), 179 U. S. 494;

It is therefore beyond question, in view of the provisions of the policies that the parties, on the eve of war, recognized the possibility of orders by the British Government or any of its Allies (thus including the United States), which might constitute a restraint of the movements of the vessel; and agreed that while the underwriters would not be liable for any claim by petitioner for frustration of the voyage, the insurance would nevertheless cover damage by enemy attack so long as the vessel was not "condemned".

Instead of enforcing the intent of the policies so clearly declared, the Court of Appeals, acknowledging that it had no precedent for it, R. 798, did what this Court and other courts have refused to do under similar circumstances. It granted the underwriters gratuitous release from liability, which they were denied in England in *Rickards* v. *Forestal etc. Co.* [1942] A. C. 50, by injecting into the policies a limitation of the underwriters' undertaking which was not contained in the explicit provisions of the contract, and which is inconsistent with its express provisions.

While the Court of Appeals undertook to "interpret" the language of the policies (R. 802) it did so without specifying in what respect the language of the policies was ambiguous or obscure.

The Court of Appeals conceded that the effect of the B. C. 2 rider was to impose on the underwriters "some extension of his liability upon such risks as he continues to assume pending the 'restraint'." The Court then went on to draw the line beyond which the "extensions" would not go. The vice of such treatment of an insurance contract is that the insured shipowner learns, ten years after the event, that his vessel was not covered as to a loss directly due to a peril named in the policy, squarely within the terms of the B. C. 2 rider, and even though he had obtained, before the loss, a special agreement that his vessel would be "held covered"! And this astonishing conclusion is grounded on the point that even though the underwriters did not say so, they should not be deemed to have intended to have insured the loss of the ship under such circumstances. The declared intent of the parties is ignored, and the Court's idea of what the underwriters would have intended "if faced in advance with the actual event" (R. 802) is substituted therefor.

In truth, the parties *were* "faced in advance with the actual event." In November, 1941, it was as well known to everyone connected with shipping, as it is now, that one of the first steps taken by a Government on declaration of war is requisition of shipping. As was well pointed out by the District Court, R. 751, the risks of war may take many forms. One of the events which may be anticipated in war is that a sovereign may seize, requisition and take a vessel. It is not only contrary to the common knowledge and understanding of the shipping business and the marine insurance world, but is against the actual words of the policies, to hold that a constructive total loss by enemy attack after a

requisition of use by the sovereign was a loss which the underwriters never contemplated.

The rule of construction "*contra proferentes*" was recognized by the Court of Appeals but that rule was not followed. Thus even though the B. C. 2 rider were ambiguous, which it is not, the Court of Appeals below "interpreted" the policies directly against the decisions of this Court:

National Bank v. *Insurance Co.*, (1877) 95 U. S. 673, 679;
Travellers Ins. Co. v. *McConkey*, (1888) 127 U. S. 661, 666;
Hagan v. *Scottish Ins. Co.*, (1902) 186 U. S. 423;
Royal Ins. Co. v. *Martin*, (1904) 192 U. S. 149, 162;
Mutual Life Ins. Co. v. *Hurni Packing Co.*, (1923) 263 U. S. 167.

If the underwriters wished to limit their undertaking stated in the language used, they should have said so, as stated by the District Court. R. 750-751. It would have been a simple matter for a limitation to have been included in the policy, especially where the attention of the underwriters was focused on the matter of frustration of the voyage and on the effect of an arrest, restraint, detainment or requisition of the vessel by the British Government or any of its Allies.

On the authorities cited, we submit that the error of the Court of Appeals below is clear and that it is immaterial whether or not a frustration of the voyage occurred on January 5, 1942 or at any other time before the loss. The policies continued by virtue of their explicit provisions, notably the B. C. 2 rider, and were in effect on February

19, 1942 when the *Portmar* became a constructive total loss by reason of enemy attack.

(e) *Departure of the vessel from the insured voyage or change of her voyage does not relieve the underwriters of liability for loss due to a peril insured against, if such event is involuntary on the part of the assured.*

It is settled that marine or war risk insurance of a vessel remains in effect throughout and after diversion from the course of the voyage as described in the policy, or change of voyage, if the departure from the proposed voyage is *involuntary* on the part of the assured.

Robinson & Robinson v. *Marine Ins. Co.*, (1806) 2 Johns (N. Y.) 89;
Post v. *Phoenix Ins. Co.*, (1813) 10 Johns. (N. Y.) 79;
Graham v. *Commercial Ins. Co.* (1814) 11 Johns. (N. Y.) 352;
Scott v. *Thompson* (1805), 1 Bos, & Pul. (N. R.) 181; 127 E. R. 429;
Rickards v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, 82-83;
British Marine Insurance Act, 1906, Section 45-(1); Section 46-(1); Section 49-(b), (d) and (e).

In the *Rickards* case, *supra*, the vessels were changed by orders of the German Government from peaceful cargo vessels into enemy blockade runners with English cargo on board, but the underwriters of the cargo were held liable for loss of the cargo when two of the ships were scuttled by their own masters on being overtaken by Allied cruisers.

In *Aktiebolaget etc. Bank* v. *American M. M. Ins. Co. (Ada)* (1925) 241 N. Y. 197 the New York Court of Appeals held on the facts there involved that there was a *voluntary* departure from the insured voyage and that the under-

writers were thus relieved from liability. But in the course of the opinion the Court recognized the principle above stated. To the same effect: *Maryland Ins. Co.* v. *LeRoy et al.* (1812), 7 Cranch 26; *Burgess* v. *Equitable Mar. Ins. Co.* (1878), 126 Mass. 70, 79; *Audenreid* v. *Mercantile Mut. Ins. Co.* (1875), 60 N. Y. 482.

These were the authorities cited and on which the District Court relied in holding that the policies were in effect at the time of the loss. R. 745-746.

Against the weight of the authorities above cited, respondent underwriters relied below on *O'Reilly* v. *Royal Exchange Ins. Co.* (1815), 4 Camp. 246. But that was only a decision at *nisi prius* and has been thoroughly discredited by the leading writers on both sides of the Atlantic. See *Arnould on Marine Insurance,* Thirteenth Edition, page 420, Section 435; *Phillips on Insurance,* (1867), page 588, Section 1025.

The British Marine Insurance Act, 1906, codified the then existing English case law on the subject. *Rickards* v. *Forestal etc. Co. Ltd.* [1942]; A. C. 50, 79. *Arnould* on *Marine Insurance,* Thirteenth Edition, page 3, Section 1.

In Section 49-(1)-(b) that Act declared the law as stated in the cases above cited and contrary to the *O'Reilly* case.

The underwriters contended below that the policies came to an end before the loss because after the vessel discharged her outward cargo she was ordered into service by the military authorities. R. 113. They pleaded that they insured the *Portmar* only on a "commercial" voyage (R. 80-81) and stressed many ordinary commercial terms of the basic marine policy form. This contention fails because on November 26, 1941 it could hardly have been thought that a vessel under charter to the United States

Maritime Commission, as the underwriters were informed (R. 262) for a voyage to the Philippines and return, was on an ordinary commercial venture.

In arriving at a conclusion in direct conflict with the authorities, and in holding that an insured shipowner may be stripped of his insurance by reason of events occurring without his consent or even knowledge, and thus without any opportunity to take steps to replace the coverage, the Court of Appeals below failed to give effect to the facts that what occurred in Australia was entirely involuntary on the part of petitioner, and that the terms of the B. C. 2 Rider explicitly covered the loss even though, contrary to our contentions hereinafter set forth, it is held that a frustration of the voyage by restraint of princes had already occurred.

It begs the question to say that the insurance covers the vessel only while on the voyage specified in the policy. The B. C. 2 rider and the "Held Covered" clause of the policies contemplate that the vessel may deviate from the specified voyage or that the voyage may be changed, but the vessel shall nevertheless remain insured. Thus the departure, or the change of voyage, becomes part of the voyage covered by the policy. The authorities cited, *ante*, pp. 38-39, are conclusive on the point that departure from the specified voyage, where involuntary, does not release the underwriter.

(f) *The decision of the Court of Appeals below is in conflict with the decision of the House of Lords in Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50.

In the *Rickards* case, British goods on three German ships at the outbreak of World War II were carried off when the German shipmasters obeyed orders of the German

Government to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes; or, as a last resort, to scuttle their vessels. The goods were insured by Lloyds' policies against both marine and war risks. The three vessels turned away from their voyages and made for neutral ports, and then, with their cargoes on board, attempted to run the Allied naval blockade and get back to Germany. Two were scuttled when overhauled by Allied cruisers; the third got through to Hamburg.

There is a close parallel between the facts of the *Rickards* case and those of the present case. All the policies contained a warranty excluding any claim for loss by frustration of the voyage, and the "Held Covered" clause. In both cases the insured property was damaged or lost by enemy action; in the present case by enemy aerial attack, in the *Rickards* case by acts of the masters of the German ships who became enemies of the British cargo owners upon the declaration of war in September, 1939.

In both cases the insured property was restrained by sovereign control without the knowledge or consent of the assured.

With the facts thus similar, the trial court in the *Rickards* case held that the voyage was frustrated by sovereign restraint, and the underwriters thereby released from liability. In the present case the Court of Appeals below reached a like conclusion.

The decision of the trial court in the *Rickards* case was reversed on appeal. The decision of the Court of Appeals herein is in direct conflict with the decisions of the Court of Appeal and of the House of Lords in the *Rickards* case.

The House of Lords in the *Rickards* case held that the meaning of the clause which warranted the policy free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrest, restraint or detainment of kings, princes, peoples, etc. was that only such

claims as could be made *solely because of frustration of the voyage* were barred by the exclusions of that warranty. See the remarks of Viscount Simon, Lord Chancellor, [1942] A. C. at page 65. Even though it appeared that a frustration of the voyage had occurred, the House of Lords held that there was a constructive total loss of the goods when the vessels quit neutral ports in an attempt to run the Allied blockade and that the constructive total losses of the goods were converted into actual total losses in the cases of the *Minden* and the *Halle* when the ships were scuttled, and as to the *Wangoni*, when the vessel arrived at Hamburg; that the British owners of the insured cargoes had a clear claim for loss of the goods, whether constructive or total, because the policies continued to cover the safety of the goods, irrespective of whether any claim for frustration of the voyage was barred by the warranty excluding such a claim.

Accordingly, it was held, regardless of whether a frustration of the voyages occurred or whether any claim against the underwriters was precluded by the warranty which excluded claims based upon frustration of the voyage, that the underwriters were liable under the policies for the total loss of the goods, constructive or actual, and that the policies survived the "frustration" of the voyage on quitting neutral ports to run the Allied blockade.*

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* In the Court of Appeal, in dealing with the underwriters' contentions and the decision of the trial judge, MacKinnon, L. J. said, [1941] 1 K. B. 225 at page 250:

> "I think it is unnecessary to discuss further this misconception as to the nature of a policy on goods. I would only add that, if Hilbery J.'s view were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, on the judge's reasoning, would in every case of such deprivation that I can imagine make that promise absolutely nugatory!"

It is of no consequence that in the *Rickards* case the insurance was upon goods, whereas here the insurance was upon a vessel. In each case the safety of the insured property was the prime subject of the insurance.

The following quotations from the opinions of the House of Lords [1942] A. C. 50, show that the war risk insurance of the goods did not terminate if the voyages were "frustrated", but remained in effect and covered the actual total loss of the goods: (italics ours)

Lord Wright, at page 88;

"* * * If the sailing from Rio under the orders of the German government did not give a claim to a constructive total loss because, for instance, there was no proper notice of abandonment, *still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the assured and was still covered by the policy.* * * *"*

Lord Porter, at pages 110-111; (italics ours)

"There remains to be considered whether there was at any time a loss, for which the assured can recover, by a peril insured against. At some time each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea according to circumstances. *At that moment the insured voyage came to an end, but it does not follow that at that moment the underwriters ceased to have any further liability for the goods which they had covered.* * * * From the time the master broke off from his contractual voyage to return to Germany, whether that be when he made up his mind to abandon the voyage (as Arnould seemed to think from his observations in s. 380), or whether it be when that purpose was manifested—to use the word found in the Marine Insurance Act, 1906, s. 45, sub-s. 2—or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods which henceforward remained in the control of the German government and in the grip of their restraint until they were lost by the Master's action in scuttling his ship. For this purpose it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so. *But that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss while the goods were still covered by the policy."*

These conclusions of the House of Lords were reached apart from the provisions of the "Held Covered" clause. [1942] A. C. 50, 82-83, 109-110. The "Held Covered" clause was held to operate only in the event of voluntary deviation or change of voyage, not where the departure is involuntary.

There is a striking similarity between the facts of the present case and those of the *Rickards* case. The decision of the Court of Appeals below cannot be reconciled with the decision of the House of Lords in the *Rickards* case.

It is therefore submitted, that whether the voyage originally described in the policies was frustrated or not, the war risk insurance policies were in effect at the time of the loss, and covered the loss even without reference to the fact that the underwriters, on February 6, 1942, specially agreed to hold the vessel covered.

(g) *The risks of the prescribed voyage were not increased.*

A further assumption in the opinion of the Court of Appeals is directly contrary to the facts of record. It was stated by the Court that "in the case at bar the requisition added *so notably to the risks of the prescribed voyage* that the voyage ceased to be the same." R. 801, (italics ours).

The very reason for the diversion of the *Portmar* to Australia, from her prescribed voyage to the Philippine Islands was the outbreak of war between Japan and the United States on December 7, 1941. Under the actual conditions of Japanese control of the sea it was virtually certain that the vessel would have become a total loss if she had proceeded on the prescribed voyage.

Under those undeniable circumstances there is no factual basis for the Court's holding that the diversion of the vessel to Australia or the uses to which she was put in Australia were in any way more dangerous than the certainty of total loss if the vessel had continued on the "prescribed voyage".

It is therefore submitted that the war risk insurance policies of the *Portmar* continued and covered the loss even though the voyage had already been frustrated.

SECOND POINT.

THE ROUND VOYAGE SPECIFIED IN THE WAR RISK INSURANCE POLICIES AND IN THE CHARTER OF THE *Portmar* WAS NOT FRUSTRATED BEFORE THE LOSS.

Because of the explicit terms of the time charter of the *Portmar* between petitioner and the United States Maritime Commission, the voyage was not "frustrated" either in law or in fact at any time before the vessel became a constructive total loss on February 19, 1942.

Petitioner contends that the question whether or not a frustration occurred on the uncontroverted facts of this record is a question of law which may be raised by petitioner for review by this Court. But if frustration of the voyage is to be deemed a question of fact, then petitioner contends that divergence between the findings on the District Court, R. 746, 751 and the findings of the Court of Appeals, R. 793, 802, should be resolved by this Court in petitioner's favor, to the effect that as a matter of fact no frustration occurred.

(a) *The charter provisions anticipated and provided for the events which occurred.*

The Court of Appeals below made the following statement in the course of the opinion: "The policy upon a voyage charter must be understood to be coextensive with the voyage, * * *". R. 801. It is therefore clear that when the Court of Appeals below referred to circumstances which "commercially speaking, put an end to—frustrate—the venture as the parties contemplated it" (R. 801) the "venture" was the voyage provided for in the charter of the *Portmar*.

under the "Held Covered" clause, in the event of deviation from or change of that voyage. Further, it notified the underwriters that the *Portmar* had been diverted to Australia under government orders and received their specific agreement to hold the vessel covered pending further advices.

Even though the principles hereinafter discussed were not sufficient for the conclusion that the underwriter should not be relieved from liability by implied conditions in view of the express stipulations in their policies made on the eve of war in full contemplation of the possibility of Government restraint of the vessel, their unqualified agreement made after the date on which the Court below found that the insurance terminated, to hold the vessel covered under the known circumstances that the vessel was operating in Australia under government orders, should be regarded either as a continuance, or reinstatement, of the policies.

If the decision below is allowed to stand, petitioner was subjected to as vicious an entrapment as could be imagined. Having no knowledge of the extent of the military controls in Australia, petitioner sought confirmation of its insurance. The underwriters, being expressly informed by Mather's cable message that the *Portmar* was "diverted to Australia on outward voyage under government orders," nevertheless agreed to hold the vessel covered. If the underwriters had notified petitioner that they refused to "hold covered", petitioner would have had a chance to obtain other insurance. But the underwriters did not decline the request; they specifically agreed to it. On what ground can underwriters be justified in repudiating this agreement?

The special agreement contained in that cable and letter provides evidence of the intent of the parties which should

The doctrine of frustration rests on the equitable principle that if it appears that in making a contract the parties contemplated the continued existence of a certain thing or state of affairs, and if the contract contains no specific provision dealing with the unforeseen contingency which has occurred, then, if it appears that the parties would have, if they had thought of it, provided for termination in such event, the Court will imply a condition to that effect. *Texas Company* v. *Hogarth Shipping Co.* (1921), 256 U. S. 619; *F. A. Tamplin S. S. Co.* v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, 406; *Blane Steamships, Ltd.* v. *Minister of Transport* (C. A.), [1951] 2 Ll. L. L. R. 155, 160; *Taylor* v. *Caldwell,* (1863) 3 B. & S. 826.

There is no room for the doctrine of frustration in this case, because the parties here made specific provisions which anticipated and provided for the very events which occurred.

The time charter of the *Portmar,* R. 18-38, contained, among others, the clauses set forth in Appendix II.

The final provisions of Article 2.27 are directed to the suspension of charter hire under the provisions of Article 2.04-(b). The result is that the charter did not provide any exception from the obligation of the charterer to pay hire in the event the vessel should navigate under direction of naval, military, Coast Guard or other governmental authorities even though damaged while so engaged. No other general exceptions of the charter may relieve the charterer from the obligation to pay the hire. *Clyde Commercial Co.* v. *West India Steamship Company* (2 Cir. 1909), 169 Fed. 275.

These charter provisions go far beyond the "conventional clause providing for exemption from liability in the event of 'restraint of princes'" referred to in the opinion of the Court of Appeals below at R. 801. The conventional

restraint of princes clause found in the charter cases relied upon by the Court of Appeals below, R. 798-800, provides only a shield against liability for nonperformance. It does not provide for what is to happen in the event that a restraint of princes occurs. That distinction was clearly stated in the *Isle of Mull* (4 Cir. 1921), 278 Fed. 131, at page 134, where the Court said:

> "The restraint of princes clause is intended for the protection of the party whose ability to carry out his contract is destroyed or impaired by the enumerated clauses. The other party cannot avail himself of it to escape his obligations. * * *"

The same shield against liability is found in the provisions of Article 2.16 of the present charter. But the fact that no exception is provided as to payment of charter hire for the time consumed by the vessel if out of service because of damage sustained while navigating under the direction of naval, military, Coast Guard or other governmental authorities as stated in Article 2.04, the provisions that under such circumstances anything done or not done by the vessel shall be a fulfillment of the contract voyage (Article 2.15) and shall not be deemed a deviation, breach of orders or neglect of duty by the Master (Article 2.27), go far beyond the ordinary defensive scope of the conventional restraint of princes clause referred to by the Court of Appeals below, and provide affirmatively for performance of the contract following the intervention of sovereign control.

In the light of these clauses, the charter frustration cases relied on by the Court of Appeals below do not support the conclusion that the war risk insurance came to an end, or that the voyage of the *Portmar* was frustrated before the loss occurred. To the contrary, in both *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products*

satisfy any inquiry as to actual intent. For here was a declaration by the parties of their intentions, made after the event on which the Court below found a frustration of the voyage and termination of the policies, and before the loss occurred. What better evidence of intent could there be?

The decision below that the underwriters were discharged from liability under the policies by governmental restraint which frustrated the voyage, should be reversed if for no other reason than the fact that on February 6, 1942 before the loss occurred on February 19, 1942, with knowledge that the vessel was in Australia under government orders, they agreed to hold the vessel covered.

(d) *The declared intent of the parties should control.*

The fundamental error of the decision below is that the Court, in disregard of the declared intent of the parties, and on the supposition that the underwriters would have refused to undertake the risk if they had been faced in advance with what was later to occur, read into the insurance policies a qualification or exception that the underwriters did not put there by their own language and which is inconsistent with the specific provisions of the policies. The judge who wrote the opinion apparently forgot that in an earlier case he had expressed the opposite view and held the parties to their declared intent. In *Eustis Mining Co.* v. *Beer, Sondheimer & Co.*, (SDNY 1917), 239 Fed. 976, he said:

> "• • • It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would not make a particle of difference in his obligation. • • •"

It passes understanding how the same judge could have so far departed from the sound principle which he stated in the *Eustis* case, as to hold herein the exact reverse of his statement in that case. Again, he cited the case of *F. A. Tamplin S.S. Co. Ltd. v. Anglo-Mexican etc. Co. Ltd.* [1916] 2 A. C. 397 as a leading authority on the subject, apparently overlooking the following language of Lord Parker, [1916] 2 A. C. on pages 422-423:

> "* * * It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency."

See also the extension of those remarks, [1916] 2 A. C. at pages 426-428, and *Larrinaga & Co. Ltd.* v. *Société Franco-Americaine etc.,* (House of Lords, 1923) 39 T. L. R. 316, 320.

It is a fundamental principle of the law of contracts, and consequently of insurance policies, that the declared intent of the parties should control; and that the Court should reach the meaning of the parties through the words they have used.

Home Ins. Co. v. *Baltimore Warehouse Co.,* (1876) 93 U. S. 527, 541-546;
Travellers' Insurance Co. v. *McConkey* (1888), 127 U. S. 661, 666;
Allanwilde Transport Corporation v. *Vacuum Oil Co.* (1919), 248 U. S. 377;

Clyde Commercial Steamship Company v. *West India S.S. Company* (2 Cir. 1909), 169 Fed. 275; cert. den. 214 U. S. 523;
The Thames & Mersey Ins. Co. v. *Hamilton, Fraser & Co.* [1887] A. C. 484, 490;
Adams et al. v. *Mackenzie* (1863), 13 C. B. (N. S.) 442, 143 E. R. 175;
A/S. Ocean v. *Black Sea & Baltic Gen. Ins. Co.* (C. A. 1935) 51 Ll. L. L. R. 305.

See also: *Maryland* v. *Railroad Company* (1874), 22 Wall. 105, 112-113; *Railroad Companies* v. *Schutte* (1880), 103 U. S. 118, 140.

In *Allanwilde Transport Corporation* v. *Vacuum Oil Co.* this Court said, 248 U. S. at page 385: (italics ours)

> "• • • There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. *We cannot step in with another and different accommodation.* • • •"

More recently the House of Lords in *Rickards* v. *Forestal etc. Co. Ltd.* [1942], A. C. 50, by Viscount Maugham, referring to the contention of the underwriters that the frustration clause barred the claim for loss of the goods, said at pp. 72-73:

> "• • • The first thing that occurs to one is that it would have been exceedingly easy to draft the clause so as undoubtedly to have this wider effect if that had been the intention. Next, if the matter is left in doubt, the clause must be construed *contra proferentes*, plainly in this case the underwriters."

and by Lord Wright at pages 91-92: (italics ours)

> "• • • The exception by its language is expressly limited to the loss of or frustration of the insured

The record completely demonstrates that both parties intended, until the constructive total loss of the vessel, to complete the "round voyage".

It is, to say the least, unprecedented, as conceded by the Court of Appeals (R. 798) that the performance of a contract should be held frustrated, where the parties to that contract thought it was in effect and were continuing with performance so far as government restraint permitted. The Court has thus imposed upon the parties to the charter a decision which they themselves did not make at the time.*

(c) *The test of "frustration"*:

The Court of Appeals at R. 800 said "* * * In all such cases the prospective length of the interruption on which the putative 'frustration' depends, must be decided by the situation as it appears at the time of the interruption."

Instead of applying that well settled rule (*Allanwilde Transport Co.* v. *Vacuum Oil Co.*, (1919) 248 U. S. 377, 386; *Bank Line Ltd.* v. *Arthur Capel & Co.*, [1919] A. C. 435, by Lord Sumner at p. 454; *The Claveresk*, (2 Cir. 1920), 264 Fed. 276, 282-283; *Borup* v. *Western Operating Corporation*, (2 Cir. 1942), 130 F. 2d 381, 386), the Court of Appeals departed from it, and used hindsight of the events which occurred later on to support a holding that as of January 5, 1942, although neither of the parties to the contract, nor their proctors at the trial, thought so, the voyage was at the end.

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* In *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919], A. C. 435, at page 460, Lord Sumner concluded his opinion with a remark exactly the reverse: (italics ours) "* * * Both thought its result was to terminate their contractual relation by the middle of June

There is not any evidence of any orders with respect to the *Portmar* on January 5, 1942 or at any time before the loss of February 19, 1942, to the effect that the *Portmar* would not be allowed, within a reasonable time, to complete her round voyage. The facts are to the contrary. The passages from port to port in Australia were a distribution of the outward cargo according to the needs of the Army, the shipper of the cargo. R. 522, 525-529. That was no different from what the *Portmar* would have done in the Philippines if the war had not occurred and if she had gone to the Philippine Islands in accordance with the charter.

These facts before the loss on February 19, 1942, do not show that there was any such urgent military need for the *Portmar* as the Court of Appeals has found, relying solely on the testimony of Colonel Plant. R. 795. Colonel Plant did not arrive in Australia until the end of March, 1942. R. 183. The military situation and emergency of which he had actual knowledge arose from the circumstances which existed after his arrival in Melbourne. R. 183-5. The fact that on February 4, 1942 the *Portmar* was ordered from Port Darwin to Wyndham, R. 293, with only 2000 drums of gasoline, and returned from Wyndham to Darwin empty of any cargo, R. 721, hardly indicates any such critical military need for the use of the vessel *at that time*, as the Court of Appeals below has found from Colonel Plant's testimony as to events which occurred much later.

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and, *as they must have known much more about it than I do, there is no reason why I should not think so too.* * * *"*

It may also be noted that the Court of Appeals below held that a frustration of the voyage occurred at a point not pleaded by the underwriters in their answer, R. 78-84, and not included in the declaration of their proctors when questioned by the District Court. R. 113.

The sailing to the port of Koepang, Timor was no more than a temporary incident, after she was free of outward cargo. When the *Portmar* returned to Darwin from that expedition on February 18th she was ordered to berth in her turn and discharge the artillery and troops which were then on board. The Timor expedition was ended. There were no further orders whatever with respect to the *Portmar* except, as already seen, that she was fixed by the U. S. Maritime Commission for the return leg of the round voyage, from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720, 796-797.

Accordingly, it is submitted that no frustration of the voyage occurred because of the provisions of the charter under which the vessel was employed on the round voyage; because governmental restraint was contemplated and provided for in the provisions of the charter; because the evidence shows that at the time of the loss arrangements had been made for a return voyage of the *Portmar* with chrome ore from New Caledonia for Philadelphia; and because the parties, as late as June 15, 1944, treated the round voyage as in effect until the constructive total loss of the vessel on February 19, 1942. *Computation of Hire*, Exhibit 24 (separate volume submitted).

THIRD POINT.

THE *Portmar* WAS A CONSTRUCTIVE TOTAL LOSS WITHIN THE PROVISIONS OF THE WAR RISK POLICIES.

The Court of Appeals below did not actually decide that the *Portmar* was a constructive total loss as a result of enemy attack which occurred on February 19, 1942 but it assumed that the vessel became a constructive total loss

through such attacks. R. 793. The whole tenor of the decision below reflects the conviction that if the policies were in effect, the loss was clearly covered and that the vessel was a constructive total loss within the terms of the policies.

The damages inflicted on the vessel by the Japanese attacks were summarized by the District Court in the eighty-fifth finding of fact. R. 730-731. See also *Michelson*, R. 310-324, 358, 362-364, 532-535, 1594-1605; *Bullock*, R. 472-478.

It was the judgment of the master of the *Portmar* that salvage was impossible and that the vessel was a constructive total loss. *Michelson*, R. 350, 355. Petitioner was so informed by cable messages late in March, 1942. R. 734. The Chief Officer of the *Portmar*, who also held a Master's license, was of the same opinion. *Bullock*, R. 496-506.

The United States Naval observer at Melbourne said that the vessel could not be salvaged as a cargo carrier. Petitioner was so informed by War Shipping Administration on April 4, 1952. *Letter*, R. 606; 734-735.

The *Portmar* was never "recovered and repaired" in the sense that she was restored to the condition and insurance classification which was hers before the enemy attacks. R. 195-196, 738.

The District Court found that after the *Portmar* was beached on February 19, 1942, and when petitioner tendered abandonment of its interest in the vessel to the underwriters on April 8, 1942, there was imminent peril of actual total loss by Japanese invasion of Northern Australia, and that it was impossible for petitioner to recover the vessel and to repair and restore her to her former condition, R. 730-737; that the "high probability" rule applied as to costs of recovery and repair. R. 752-754. Accordingly, the District

Court held that the *Portmar* was a constructive total loss within the policies. R. 752, 754.

(a) Imminent peril of actual total loss; recovery and repair impossible.

The extensive damages sustained by the vessel, the imminent peril of actual total loss by Japanese invasion of Northern Australia, the practical impossibility of recovery and repair by the owner or by any commercial salvor in view of the war situation, domination of the sea and air around the North and East coasts of Australia by the Japanese navy and air force, the unavailability of salvage equipment, towing vessels, drydock and repair facilities, have all been established by findings of fact on uncontroverted evidence. R. 730-732; 735-737. See also *Plant*, R. 193; *Michelson*, R. 350, 355, 357-359; *Bullock*, R. 496, 505-507.

The right of the assured to claim a constructive total loss in the event of disaster to the insured property has long been recognized. *Rhinelander* v. *Ins. Co. of Pennsylvania* (1807) 4 Cranch. 29; *Peele* v. *Merchants Ins. Co.* (1822) Fed. Cas. No. 10905, 3 Mason 27; *Adams* v. *Mackenzie* (1863) 13 C. B. (N. S.) 442; 143 E. R. 175; *Mason* v. *Marine Ins. Co.*, (6 Cir. 1901) 110 Fed. 452; *Phillips on Insurance*, V. 2, page 227, Sec. 1492. The reason for it was recently restated in *Rickards* v. *Forestal, etc., Co. Ltd.*, [1942] A. C. 50, 83. See also *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582.

The burden of dealing with the wreck is properly that of the underwriter, who is paid a premium for such service. The assured is entitled to "disentangle himself," to receive his capital, and to use it in new enterprise. *Rickards* v.

Forestal etc. Co., supra; Hamilton v. *Mendes,* (1761) 2 Burr. 1198, 1209; 97 E. R. 787, 793.

The classic statement of the right of abandonment for total loss, made by Mr. Justice Story in *Peele* v. *Merchants Ins. Co.,* 19 Fed. Cas. at page 111* is quoted in Phillips on Insurance, V. 2, page 244, Sec. 1519, as a "scientific and accurate definition of total loss". It is so regarded in England. Arnould on Marine Insurance, 13th Ed., V-2, Sec. 1099.

To the same effect: *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. (37 U. S.) 378, 398; *Royal Exchange Assurance* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32; *Allen* v. *Sugrue,* (1828) 8 B & C 561; 108 Eng. Rep. 1151; *Irving* v. *Manning,* (1847) 1 H. L. Cas. 287; 9 Eng. Rep. 766; *Young* v. *Turing,* (1841) 2 Scott 752; 133 Eng. Rep. 883; *Sailing Ship Blairmore* v. *Macredie* [1898] A. C. 593; *Holdsworth* v. *Wise* (1828), 7 B & Cr. 794; 108 E. R. 919.

" * * * The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority, where there is a present total loss of the physical possession and use of the ship, as in case of submersion; *where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port, where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value.* None of these cases will, I imagine, be disputed. If there be any general principle, that pervades and governs them, it seems to be this, *that the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost.* (italics ours) * * *"

The British Marine Insurance Act, 1906, declared the common law in line with those authorities. See sections 60-(1) and (2)* on constructive total loss:

The provisions of Section 60-(2)-(i) of the British Marine Insurance Act, 1906 apply to loss by stranding. Arnould on Marine Insurance, 13th Ed., V-2, Section 1091, page 996, Note 6. In that note the author cites *Hall* v. *Hayman* (1912), 2 K. B. 5, and *British Dominion Gen. Ins. Co.* v. *Duder* (1914), 3 K. B. 835 (reversed on other grounds (C. A. 1915), 2 K. B. 394), with the comment that in both cases it was not disputed that when a vessel is ashore on the rocks, her owners are deprived of the possession of her.

In *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582, the Court affirmed a decision of constructive total loss (SDNY, 40 F. Supp. 404) on the ground that abandonment was justified because the indicated cost of repair would exceed half the repaired value (American rule). The decision below in that case found constructive total loss on either of two grounds; imminent peril of total loss, or because of the probability that the cost of recovery and repair as later shown by the bids would exceed half the insured value. As

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*"60.-(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured *is reasonably abandoned on account of its actual total loss appearing to be unavoidable,* or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred."

"(2) In particular there is a constructive total loss—

"(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) *it is unlikely that he can recover the ship* or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. * * *" (italics ours).

the decision was affirmed on the latter ground, the Court found it unnecessary to deal with the former.

The *Portmar* never was repaired and restored to her former condition. *Plant*, R. 195-196; *Haggett*, R. 208. In this respect the present case differs from other cases in which a ship after abandonment for constructive total loss, and rejection of the abandonment, has been actually recovered and restored to former condition at less than the anticipated expense. But even in such a case the right of abandonment and the claim for constructive total loss is not affected by the result. *Orient Ins. Co.* v. *Adams* (1887), 123 U. S. 67, 74-75; *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. (37 U. S.) 378, 397; 3 Kent Comm. 321; Arnould on Marine Insurance, 13 Ed. Sec. 1051, 1055.

(b) The high probability on April 8, 1942 that the cost of recovering and repairing the Portmar would exceed the insured value.

The rule that the assured may abandon on "high probability" that the expense of recovery and repair will exceed half the value of the repaired vessel (American rule) or the entire value of the repaired vessel (English rule), is historic, both in England and America. 3 *Kent Commentaries*, 321; *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582; *British Marine Ins. Act, 1906*, Sec. 60.

In England, the rule is that the situation under which the abandonment is tendered must be judged as of the date of the writ. *Rickards* v. *Forestal etc. Co.* [1942] A. C. 50, 85; *Pesquerias, etc. S. A.* v. *Beer* (1946) 79 Ll. L. L. R. 417, 432-433.

In America the situation under which an abandonment is tendered must be judged as of the date of the abandonment.

Rhinelander v. *Insurance Co. of Penna.*, (1807) 4 Cranch. 29; *Marshall* v. *Delaware Ins. Co.*, (1808) 4 Cranch. 202; *Bradlie* v. *Maryland Ins. Co.* (1838) 12 Pet. 378, 397-398.

Both tests are usually brought into line by an agreement, as was done here, that the sufficiency of abandonment shall be judged as though a writ had been issued on the date of the abandonment. *Letters*, R. 587-589.

The judgment of the Master on March 3rd, March 10th and April 8th, 1942 was that the estimated total cost of salving, towing, repairing and restoring the vessel to former condition would be "several times the value of the vessel"; that it could not be done at any cost in his estimation that was worth considering; "that those costs, if they could by some miracle be done, they would be so staggering that there was no common sense in it." *Michelson*, R. 350, 355, 357-358. The Chief Officer's judgment was the same. *Bullock*, R. 496, 506-507.

Evidence of subsequent events may be received solely for the purpose of showing what the situation was or what the probabilities were as of the date of abandonment. *Peele* v. *Merchants Ins. Co.* (1822) F. Cas. 10,905; 19 F. Cas. 103; *Bradlie* v. *Maryland Ins. Co.* (1838) 12 Pet. 378, 398.

The first figures which came to the notice of petitioner after the tender of abandonment (R. 736-738) were as follows:

Actual out-of-pocket *costs* of the towage of the *Portmar* from Darwin to Brisbane (R. 223-736)	$ 55,130.00
Estimated cost of repairing and restoring the *Portmar* to classification as before the enemy attacks based on survey report of September 19, 1942 by competent surveyors employed by petitioner at Brisbane, £120,000 Australian equivalent to (R. 648, 737)	390,000.00
Salvage claim asserted by the Commonwealth of Australia, £100,000 Australian equivalent to (R. 150, 737)	325,000.00
Salvage claim asserted by United Proprietary Ltd. and John Protheroe Williams, £50,000 Australian equivalent to (R. 150, 738)	162,500.00
	$932,630.00

The insured value of the *Portmar* stated in the war risk policies was $860,000. The sound condition value of the *Portmar* was $688,000. R. 179. The above figures bore out in every respect the judgment of the Master and Chief Officer made on the spot before they left the *Portmar* at Darwin, and reflected a clear case of constructive total loss on April 8, 1942 because of the high probability that costs of recovery and repair would have exceeded not alone the sound condition value, but also the insured value.

The figures set forth above, however, are by no means complete as to what the total cost of recovering and repairing the vessel would have been. No allowance is made for overhead and profit of a private salvor in towing the vessel from Darwin to Brisbane; nor for wages of the riding crew on the *Portmar;* nor for the commercial

value of all the work that was done at Brisbane by the Quartermaster Corps Detachment under Major Haggett. These and other items, if added, would have swelled the total, and only more strongly confirmed the high probability as of April 8, 1942 that the expense of recovering and repairing the vessel would exceed the insured value. *Royal Exchange Assurance* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32, 39.

The probabilities as of April 8, 1942 as to cost of repair and restoration to former condition and insurance classification are shown by the Brisbane survey of September 19, 1942.

Respondents suggested below that the Brisbane survey report, R. 642-649, was "ex parte". But it was offered and received without objection (*Colloquy,* R. 173) and is therefore competent evidence as showing the probabilities as of April 8, 1942. The cases cited below by respondents, *Abbott* v. *Sebor* (1802), 3 Johns. Cas. (N. Y.) 39, 46, 47 and *Howard* v. *Orient M. Ins. Co.,* (1864) 25 N. Y. Super. 539, 550 hold only that such survey reports may be objectionable under the hearsay rule. No such objection was taken below.

The Sydney survey report, dated February 15, 1943, should not be considered on the point of probabilities as of April 8, 1942.

The surveyors McCowan and Erskine who apparently* represented the underwriters at the Sydney survey, had already inspected the vessel at Brisbane. See *Sydney Survey Report,* R. 650-651. But only one of them, McCowan, signed the "Summary of Expenditure" annexed to the Sydney survey report. *Survey Report,* R. 654. What they found in their examination at Brisbane is not disclosed by the record.

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* Howell and Gibson represented petitioner. *Michelsen,* R. 395 414. Carment represented War Shipping Administration. *Michelson,* R. 415.

The Sydney survey report was also offered and received without objection. But it is entitled to no weight whatever because it was too remote to reflect the probabilities as of the tender of abandonment on April 8, 1942, being made about nine months later, and at a time when it was known (*Colloquy*, R. 204) that it was never to be used for repairs to restore the vessel to class, because no such repairs were to be made; and because a large amount of work had already been done, the true value of which, under the circumstances, was not and could not be properly appraised. R. 738-739. Further, the patch-up job done on the hull (*Colloquy*, R. 209) was accepted in that report as sufficient for purposes of the estimate (*Survey Report*, R. 652) whereas Plant, an experienced steamship operator, said that no owner would ever accept that kind of work. *Plant*, R. 195-196. See also *Haggett*, R. 208. It will also be noted that before the Sydney survey report was issued, the underwriters had already repudiated liability. *Letter*, R. 590-591.

This is not a question of establishing the amount of damages in tort as in the cases relied on by respondents below, *Pennsylvania* v. *Downer*, (2 Cir. 1926) 11 F. 2d 466, *The Westchester*, (2 Cir. 1918) 254 Fed. 576; *The Mason* (2 Cir. 1918) 249 Fed. 718; *The Elmer A. Keeler* (2 Cir. 1912) 194 Fed. 339.

For the reasons above stated the Sydney survey should be disregarded as was one of the bids in *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942) 129 F. 2d 582.

(c) *The constructive total loss clause of the marine policy implied the high probability rule.*

The underwriters argued below, and may contend here, that the constructive total loss clause of the maritime policy form (which for convenience we shall call the "marine CTL

clause"), contains a "formula" which precluded the tender of abandonment and the claim of petitioner for constructive total loss of the *Portmar*.

There appears to be a vague suggestion that the "formula" superseded the high probability rule. The marine CTL clause, reads as follows:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. * * *" R. 70-71; 712.

This clause is ambiguous. The words "shall exceed" require interpretation. Those words could be taken to mean "shall actually exceed after the expenditures are made", or they could more sensibly be taken to mean "shall probably exceed".

The former version refutes itself. It would mean that no claim for constructive total loss would lie under the marine CTL clause, until the assured had actually expended more than the insured value of the vessel in order to recover the insured value. In *Reed* v. *Insurance Co.* (1877), 95 U. S. 23, this Court refused to construe language in an insurance policy to mean what would be so unreasonable as to amount to an absurdity.

Clauses similar to the marine CTL clause above quoted have already been construed as contemplating and including the high probability rule. *Orient Ins. Co.* v. *Adams* (1887), 123 U. S. 67; *Royal Exchange Assur.* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32; *Chicago S.S. Lines* v. *U. S. Lloyds* (7 Cir. 1926), 12 F. 2d 733; *Klein* v. *Globe & Rutgers Fire Ins. Co.* (*The Tornado*), (WD Pa. 1924, not officially reported) 1924 AMC 452; aff'd 2 F. 2d 137.

It has been held that in other forms of clauses the parties by explicit and unmistakable provisions have made the

right of abandonment depend on the actual result, rather than on probabilities. *Soelberg* v. *Western Ass. Co.* (9 Cir., 1902), 119 Fed. 23. *Wallace* v. *Thames & M. Ins. Co.*, 22 Fed. 66, 70; *Searles* v. *Western A. Co.*, 88 Miss. 260; *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.* (9 Cir. 1916) 236 Fed. 618. There is no comparison between the clauses involved in such cases and the marine CTL clause found in the American Hull Form, 1941, herein.

The District Court quoted and followed the decision in *The Tornado, supra,* R. 752-754 and held that the marine CTL clause contemplates the application of the high probability rule. R. 753.

The marine CTL clause should be read as though it contained the words "shall probably exceed" instead of the words "shall exceed"; or that the words "shall exceed" speak as of the time of abandonment, and thus, looking to the future, contemplate the "probabilities".

(d) *The marine* CTL *clause relates only to a constructive total loss based upon the probable costs of recovery and repair, not to a situation of impossibility of recovery and repair.*

In view of the abundant authority already discussed which recognizes various and distinct grounds for constructive total loss, i.e., among others, imminent peril of total loss, impossibility of recovery and repair, as well as the high probability that the cost of recovery and repair would exceed the repaired value (or the insured value, if the policy, as here, so provides), the present marine CTL clause, by its own terms, should be deemed to relate only to the last category mentioned.

It should not be interpreted as excluding any claim of constructive total loss based on other recognized grounds

Company [1916], 2 A. C. 406, and in the *Isle of Mull, supra,* the Courts were careful to state that *the effect* of the contingency which worked the frustration was not covered by any provision of the contract and thus the question lay within the power of the court to imply a condition. A similar absence of specific provision led to the decision of this Court in *Texas Company* v. *Hogarth Shipping Co.* (1921), 256 U. S. 619, 631.

Nothing could be clearer from the express provisions of the charter than that almost every conceivable contingency of military interference was expressly contemplated and provided for as being within the charter voyage.

The explicit provisions in the present charter as to the consequences of Government intervention bar the implication of inconsistent provisions and a finding of frustration thereon. *Allanwilde Transportation Corporation* v. *Vacuum Oil Co.* (1919), 248 U. S. 377; *Texas Company* v. *Hogarth Shipping Co.* (1921) 256 U. S. 619, 630-631; *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican etc. Co. Ltd.* [1916] 2 A. C. 397, 422-423, 426-428; *Larrinaga & Co. Ltd.* v. *Societe Franco-Americaine etc.* (House of Lords, 1923), 39 T. L. R. 316, 320; *Banck* v. *Bromley & Son* (K. B. Div. 1920), 37 T. L. R. 71.

(b) *The conduct of the parties showed that they regarded the round voyage as in effect until February 19, 1942.*

Apart from the provisions of the contract and the authorities above cited, the conduct of the parties themselves was directly contrary to the finding of the Court of Appeals that a frustration of the voyage occurred on January 5, 1942, or that a frustration of the voyage occurred at any time before the loss occurred on February 19, 1942.

It must be remembered that the voyage in question was a round voyage.

Petitioner's and Charterer's intention to complete the round voyage never changed before word was received of the loss and the impossibility of salvage. R. 157. On January 17, 1942 petitioner was informed that U. S. Lines was to be the homeward agent of the U. S. Maritime Commission for a cargo of chrome ore to be loaded on the *Portmar* at New Caledonia for Philadelphia. R. 142-148.

On February 13, 1942 the *Portmar* was temporarily impressed into the service of the United States by requisition of use when the United States, as sovereign, ordered the *Portmar* to load the artillery detachment, guns and equipment, and on February 14, 1942 when she was ordered, in convoy conference on board U. S. S. *Houston*, to sail in convoy toward the Island of Timor. *United States* v. *Russell* (1871), 13 Wall. (U. S.) 623, 627; *Kimball* v. *U. S.* (1869), 5 Ct. Cl. 252; *American Mail Line Ltd.* v. *U. S.* (1944), 101 Ct. Cl. 377.

Notwithstanding that the vessel was temporarily impressed into the public service by the United States as sovereign, the Master's action in following such government orders was not a deviation, breach of orders or neglect of duty because of the specific charter provisions above quoted; and the obligation to pay the hire under Article 2.03 of the charter continued because of the provisions of Articles 2.04(b) and 2.27.

The United States continued payment of the charter hire and has paid the hire up to February 19, 1942 the date on which the vessel became a constructive total loss, in accordance with the provisions of Articles 2.03, 2.04 and 2.27 of the charter. *Charter*, R. 22-24, *Findings of Fact*, R. 742.*

* On June 15, 1944, the hire, theretofore paid to March 1, 1942, was adjusted to February 19, 1942 by a credit on hire due to petitioner on another vessel. *Computation of Hire*, Exhibit 24 (separate volume submitted).

> when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss."

It is submitted that under the authorities cited *ante*, pp. 38-39, and the special "Held Covered" agreement of February 6, 1942, this Court should hold that the policies were in effect at the time of the loss on February 19, 1942.

The case should end there. Underwriters should not be heard to argue any afterthoughts or urge any ground of defense not stated in their deliberate and considered repudiation letter written under the advice of counsel about a year after the loss occurred. There was ample time for investigation and consideration. Underwriters made their bed and should be made to lie in it. They are not entitled to "mend their hold". They should stand or fall by the position they have taken.

Ohio & M. R. Co. v. *McCarthy* (1877), 96 U. S. 258, 267-268;

Luckenbach S. S. Co. v. *W. R. Grace & Co.* (4 Cir. 1920), 267 Fed. 676;

Grimwood v. *Munson S. S. Line* (2 Cir. 1921), 273 Fed. 166;

Second National Bank v. *Lash Corporation* (3 Cir. 1924), 299 Fed. 371;

Littlejohn v. *Shaw* (1899), 159 N. Y. 188.

This rule has been enforced against insurance companies in the following cases:

Pennsylvania Fire Ins. Co. v. *Hughes* (5 Cir. 1901), 108 Fed. 497;

Brink v. *Hanover Fire Ins. Co.* (1880), 80 N. Y. 108;

Kiernan v. *Dutchess County Mutual Ins. Co.* (1896), 150 N. Y. 190, 196;

The Anthony D. Nichols (SDNY 1931), 49 F. 2d 927;

George etc. Ins. Co. v. *Allen* (1900), 128 Ala. 451.

Therefore it is not open to the underwriters to contend that *even though the policies remained in effect,* petitioner is *precluded* from recovery on the ground that the *Portmar* was "converted into a troop ship on an independent voyage", or was "deliberately exposed to risk of loss," or that the tender of abandonment was defective because the consent of the United States Maritime Commission was not first obtained.

The following argument on the merits is subject to the foregoing reservation.

(a) "Conversion to troopship on independent voyage."

As the Timor sailing was utterly involuntary and under compulsion of sovereign orders, it makes no difference that the Timor sailing was thought to be hazardous, although it was by no means of the character suggested by the underwriters below. The *Portmar* was being sent with troops and guns for the defense of Koepang. R. 722. That was not an "invasion of enemy territory" as repeatedly and baselessly stated by respondents below when the Timor voyage was described as "an attempted army occupation of foreign territory" and as an "invading expedition to capture and occupy the port of Koepang".

It was found as a fact by the District Court that the Island of Timor was then in the hands of the Allies of the United States, and that Japanese troops did not land on Timor until March 1, 1942. R. 722.

It was also found by the District Court that there was put on board the *Portmar* "a motor launch, the *Nevbet*, belonging to the Australian Army." R. 722. That motor launch had been enlarged by the respondents to the status of "troop landing launch"; a "large landing launch", and "a landing barge." These exaggerations disappear in the light of the facts found by the District Court, as stated above.

The port of Koepang had already been attacked by aircraft but by that time vessels in other theatres were plying to and from ports that had been bombed at one time or another. And as for the aspect of an "invading expedition to capture and occupy the port of Koepang", the Court is aware that it takes more than one motor launch to carry out an amphibious "invasion of enemy territory".

A fair examination of the facts reveals the lack of substance in the assertions made by respondents as to the character of the Timor sailing.

Cases in which it was held that *voluntary* deviations occurred, have nothing to do with the question now before the Court. The District Court found as a fact that the Master of the *Portmar* acted throughout under compulsion of soverign authority. R. 718. Therefore petitioner is entitled to recover under the cases cited *ante*, pp. 38-39, especially *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50.

This Court should therefore ignore the following cases and texts relied on by respondents below all of which refer to instances of *voluntary* departure from the insured voyage or *voluntary* increase of the insured risk: *Snyder* v. *Atlantic Mutual Ins. Co.* (1884), 95 N. Y. 196; *Seccomb* v.

Provincial Ins. Co. (1865), 92 Mass. 305; *Arnould on Marine Insurance*, 13th Ed., Sec. 406, p. 400; *Dart on Deviation* quoted from *Knauth on Ocean Bills of Lading*, p. 199; *Andrews* v. *Essex F. & M. Ins. Co.* (1 Cir., 1822), F. Cas. 374; 3 Mason 6; *Herman, Briggs & Co.* v. *Western M. & F. Ins. Co.* (1839), 13 La. 516.

(b) "Deliberate exposure to risk of loss."

In all her passages preceding the Timor sailing, the *Portmar* never saw an enemy. In the Timor expedition the *Portmar* was given a heavy naval escort, the cruiser *Houston* and four Australian naval corvettes. Every possible precaution was taken for her protection.

In going back to January 5, 1942 when the vessel reached Brisbane, and holding that the round voyage ended and the insurance terminated at that point, the Court of Appeals overlooked the fact that in their opening statement under questioning by the District Court, proctors for the underwriters took quite a different position and limited their contention, as to termination of the policies, to the point "when the last of the cargo was out" (at Wyndham) "and she was then ordered to do something else * * *", i.e., the Timor sailing. R. 113.

Respondents below cited *Cleveland* v. *Union Ins. Co.* (1811), 8 Mass. 308, where the loss was due to negligence of the Captain in leaving his papers behind, clearly not applicable here.

They also cited *Haven* v. *Holland* (1 Cir., 1820), F. Cas. 6229, 2 Mason 230. It was a decision in which the cargo underwriters were held liable to the assured. Judge Story's observations that the vessel had no right to cruise at large for prizes merely stated the general rule that the underwriters are relieved if there is a voluntary deviation or

voluntary increase of the risk. It was held, however, that no such deviation or increase occurred if the vessel captured the prize in self-defense.

They cited *Newtown Creek Towing Co.* v. *Aetna Ins. Co.* (1900), 163 N. Y. 114 and *Standard Marine Ins. Co.* v. *Nome Beach Lighterage & Transportation Co.* (9 Cir. 1904), 133 Fed. 636, in both of which the insured vessel was deliberately forced through ice. Here again respondents missed the distinction between voluntary act of the assured, or for which the assured is responsible, and involuntary act under compulsion of sovereign authority.

Finally, they relied on *Williams* v. *New England Mutual Marine Ins. Co.* (1869), 3 Cliff. 244. There a vessel was chartered to the War Department of the United States Government under a charter which constituted a demise, for use as a Government army transport. Respondents suggested that "like the *Portmar*" she was "in charge of her owner's master". That is not correct. The personality of the master remained the same but he became, by the charter, the employee of the United States as operator of the vessel. The Master was directed by the Government, as charterer, to proceed across Hatteras bar for delivery of ordnance stores to the Union troops. It was known that the vessel could not possibly get across the bar in safety, because of her draft. She made the attempt, stranded, and became a total loss. It was agreed that the attempt to cross the bar was unjustifiable, rash and hazardous. In effect, the Government deliberately cast away the vessel of which it was the owner *pro hac vice*. Accordingly the hull underwriters were held discharged from liability to the owner of the vessel.

The *Williams* case has no relation to the present case because here the charter of the *Portmar* was not a demise. Petitioner did not, by any contract or consent, put the Gov-

ernment in a position where it could, as owner *pro hac vice*, give orders to the *Portmar*. The charter contained an express provision to the contrary. *Charter*, Article 2.21, R. 36. Petitioner remained the operator of and in possession of the vessel at all times. *Robins Dry Dock, etc. Co.* v. *Flint, et al.* (1927), 275 U. S. 303; *The Volund* (2 Cir. 1910), 181 Fed. 643. Possession and control as charterer is the distinguishing note of a demise charter. *Leary* v. *United States* (1871), 14 Wall. 607; *United States* v. *Shea* (1894), 152 U. S. 178; *Schnell* v. *United States* (2 Cir. 1948), 166 F. 2d 479. What the master did was done as petitioner's master under compulsion of *sovereign* orders of the United States, a situation entirely different from that found in the *Williams* case, where the orders were given, by virtue of the charter, by the Government as owner *pro hac vice*.

In *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, the goods were indeed "deliberately exposed to risk of loss" by the masters of the vessels. Indeed, in two of the cases they were *actually destroyed* by the masters of the vessels. Yet the underwriters were held liable, because the acts of the masters were under sovereign orders.

On the general subject of "deliberate exposure to risk", it should be noted that the above cases cited by respondents below all require that there be a causal relation between the risk to which the insured property is exposed, and the loss. The facts of this case are clear that the *Portmar* received almost all of the damage for which this suit is brought while lying at anchor in the harbor of Port Darwin where she would have been if she had never sailed for Timor at all, nor received in the meantime any other orders from the United States, as charterer or as sovereign. True, she had field pieces and ammunition in her holds, and troops on board, but she was not attacked by Japanese aircraft on that account; she was attacked, as stated by the District

Court, because she was an American ship lying in the port of Darwin. R. 114. There was no causal connection whatever between the Timor sailing and the damage done to the *Portmar* by the Japanese atttack at Darwin on February 19, 1942.

(c) Consent of the United States Maritime Commission to petitioner's tender of abandonment was either unnecessary, or was waived by the underwriters.

The underwriters declined to accept the abandonment. *Letters,* dated April 8, 1942, R. 587-588. See also the declination of the Excess Insurance Company, Ltd. dated April 9, 1942. *Letter,* R. 589.

Respondents urged below that the "abandonment" was defective because it does not appear that it had the consent of the United States Maritime Commission. But there is not any authority whatever for that proposition. No case has been cited construing Sections 9 and 37 of the Shipping Act, 1916 as applying to the transfer of a shipwreck by an American assured to British underwriters. Those statutes appear to apply to going vessels, not to wrecks.

Respondents referred below to an opinion of the Attorney General dated December 11, 1944, 40 Op. A. G. 342, 1945 AMC 824. It will be seen that the Attorney General's opinion deals only with Section 27 of the Merchant Marine Act, 1920, as amended, which provides that once "sold foreign", no reentry of the vessel into the coastwise trade will be permitted. The Attorney General, after a full review of the authorities, held that the transfer of ownership to the foreign underwriters which occurred by acceptance of the abandonment and payment of the loss in the cases under consideration was a sale within the meaning of Section 27 of the Merchant Marine Act, 1920, as amended. There is

no indication that the Government consented to the abandonments. Yet no suggestion was made by the Attorney General that the abandonments in the cases in question were invalid. Indeed, it was treated as a fact that they were valid; otherwise the vessels had never been "sold foreign".

There is nothing in that opinion of the Attorney General which supports the contention that the abandonment of petitioner's interest in the *Portmar* to the underwriters was invalid for lack of consent of the Maritime Commission. And respondents did not cite any other authority on the subject whatever.

Further, these policies were issued in full sight of the provisions of Sections 9 and 37 of the Shipping Act, 1916. In view of the requirement that abandonment must be promptly made in order to claim a constructive total loss, it could never have been intended that the owner must await the consent of the Maritime Commission before he could make a valid abandonment.

It would seriously affect a vast amount of marine and war risk hull insurance written by English underwriters in the United States, if it were to be announced by this Court that no abandonment may be made for constructive total loss except with Government consent. The whole history of abandonment is that it is an absolute right of the assured. No outside conditions have ever been attached to it and none should ever be.

But even though Government consent were required for the actual transfer of title to the underwriters, the letters of April 8, 1942 of Messrs. Stephens to the underwriters were only a tender or offer of abandonment.

An "abandonment" need not be in any particular form. In *Patapsco Ins. Co.* v. *Southgate*, (1831) 5 Pet. 604, 622

the Supreme Court said that "in whatever mode or form it is made, it ought to be explicit and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title and interest in the subject insured." It is sufficient if the intent to abandon is clear.

An "offer of abandonment" is sufficient for a claim of constructive total loss. Arnould on Marine Insurance, Sections 1189-1190. See *Marshall* v. *Delaware Ins. Co.* (1808) 4 Cranch. 202, *Peele* v. *Merchants Ins. Co.* (1822) 19 F. Cas. 98, 101; *New York Ins. Co.* v. *Roulet* (1840) 24 Wend. (N. Y.) 505, 513; *Pesquerias etc. S. A.* v. *Beer* (1946), 79 Ll. L. L. R. 417, 433. A "tender" of abandonment was effective in *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582, 584.

Where the underwriters decline to accept the abandonment the owner retains the legal title as trustee for the underwriters. *Walden et al.* v. *Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 324; *New York Ins.* v. *Roulet* (1840), 24 Wend. (N. Y.) 505, 513, 517; *Abbott* v. *Broome* (1808), 1 Caines. (N. Y.) 292; *The Boston* (D. Mass. 1846), F. Cas. 1673; *The Packet* (D. Mass. 1823) F. Cas. 10,654; *Scottish Marine Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. Scot. 334, 342; *Ocean Steam Nav. Co. Ltd.* v. *Evans* (C. A. 1934), 40 Com. Cas. 108.

It follows that the offer or tender of abandonment made by petitioner was valid. It offered to the underwriters complete transfer of the interest of petitioner in the vessel. If the underwriters were willing to accept the offer, question might then have arisen whether or not the consent of the Maritime Commission should be obtained.

It is a maxim of the law of contracts that no man is required to do a useless act. Williston on Contracts, Rev.

Ed. V. 3, Section 698-(a); Restatement, Contracts, Sec. 306; *Royal Ins. Co.* v. *Martin* (1904), 192 U. S. 149; *Allegheny Valley Brick Co.* v. *C. W. Raymond Co.* (2 Cir. 1914), 219 Fed. 477, 482. It is unreasonable for the underwriters to contend that the consent of the Maritime Commission should first have been obtained to an offer which the underwriters intended to decline anyway. There was an outright waiver of "abandonment" or of any condition as to Government consent, if any such condition ever existed. *British Marine Insurance Act, 1906*, Sec. 62-(8).

It was suggested by respondents that it is manifestly beyond their power to waive the prerogatives of the Maritime Commission. Even so, it was manifestly within their power to waive abandonment as a matter of ordinary contract law, and under the explicit provisions of Section 62-(8) of the British Marine Insurance Act. By declining the offer of abandonment, they waived any abandonment at all; and thus waived any conditions, whatever they might be, which might attach to an abandonment.

The District Court found (R. 755) that at the time of the rejection of the tender of abandonment, the right and authority of petitioner to transfer title in the event of acceptance was not questioned; and that it was not made in whole or in part the basis of the rejection. Nor did the underwriters raise the point nine months later when they initialed the repudiation letter after "advice of counsel". *Letter*, R. 590-591. It was not even pleaded when the underwriters filed their answer to the libel, three years after the libel was filed. It first formally appeared in the case when the underwriters filed their brief after the close of the trial. If there ever was a lawyer's afterthought, this is it. The District Court disregarded it and it should receive the same treatment in this Court.

CONCLUSION.

THE DECISION HEREIN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE REVERSED AND THE DECISION AND DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HEREIN SHOULD BE REINSTATED.

Dated: New York, December 12, 1952.

Respectfully submitted,

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APPENDIX I.

Pertinent Clauses of the war risk insurance policies, SS. Portmar, Schedule A, Attached to Libel, R. 70-71.

"at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."

* * * * *

"Only against the risks of war, strikes, riots and civil commotions as per American Form attached."

* * * *

"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovery and repairing the Vessel shall exceed the insured value.

"In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."

* * * *

"F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above

warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

* * *

WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty."

* * *

"The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impeding hostilities or sanctions."

* * *

"Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"* * * The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts

are known to the Assured and/or their managers and an additional premium paid if required."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71; 598, 711-715.

and to which by reason of its own terms it plainly does not apply. So violent and sweeping an effect should not be given to the marine CTL clause in the absence of any words clearly indicating such an intent of the parties. *Reed* v. *Ins. Co.* (1877), 95 U. S. 23.

Consonant with our contention in that respect, there is a provision in the war risk clauses which limits any exclusions which might be drawn from the wording of the marine CTL clause.

The war risk clauses attached to the present policies contain the following clause, which for convenience we shall call the "war risk CTL clause":

> "* * * The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

R. 70-71; 714.

Thus the war risk underwriters emphasized the limited effect of the marine CTL clause, as applied to war risk losses. The clause on which the underwriters rely, as setting up a "formula", therefore, does not apply to petitioner's claim for constructive total loss insofar as that claim is based, as allowed by the District Court, on imminent peril of total loss and impossibility of recovery and repair due to the domination of the area by the Japanese navy and air force.

Such interpretation does not emasculate the marine CTL clause. There remained ample scope for the marine CTL clause as so limited. A vessel might have been damaged by a bomb or torpedo and made her way to safety at an allied or neutral port. If repairs could have been made there, and access to the vessel would not be prevented by an enemy fleet or air force, the sole question would have been as

to the probable cost of repairs. Such a case would be governed by the marine CTL clause properly construed to reflect the high probabilities as to cost of repairs of the physical damage.

The marine CTL clause therefore, by its own terms and as clearly stated by the war risk CTL clause, has nothing to do with certain aspects of constructive total loss as involved in this case, viz. a war risk damage in a remote port with imminent danger of actual total loss and impossibility of recovery and repair at any cost.

The findings and conclusions of the District Court that the *Portmar* was a constructive total loss within the war risk policies should, therefore, be adopted and approved by this Court.

FOURTH POINT.

THE UNDERWRITERS ARE BARRED FROM RAISING ANY GROUND OF DEFENSE OTHER THAN THOSE STATED IN THE REPUDIATION LETTER OF JANUARY 8, 1943.

The repudiation letter written by Thomas Stephens & Sons, Limited, of London to Mather & Company of Philadelphia, dated January 8, 1943 will be found at pages 590-591 of the Record. The District Judge found that the war risk underwriters herein caused Messrs. Stephens to write that letter and that it bore the initials of the leading underwriter and of all the other underwriters. R. 740-742.

The repudiation contained in that letter is based on the following specified grounds:

> "Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or

rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * *

PART II.

* * *

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss; * * *

"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or

(b) because of breach of orders or neglect of duty by the Master, officers or crew, * * *"

Provided, however, That except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

"(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to a peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, no other governmental authorities, or discharging alongside or into ships; or"

* * *

"ARTICLE 2.15.

* * *

(v) *War Clauses*

* * *

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. * * *"

"ARTICLE 2.16. * * * And neither the Vessel, her master or Owner, nor the Charterer, shall unless

otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * no exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

"ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer."

"ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *"

APPENDIX III.

Historical Facts

1. Prior to November 26, 1941, negotiations between the Secretary of State, Hon. Cordell Hull, and the Japanese envoys Admiral Kichisaburo Nomura and M. Saburo Kurusu, approached a critical stage. The daily press carried news items of increasing tension in the Pacific situation. The possibility of war with Japan was openly recognized in American and British official circles. The British Prime Minister had discussed the extent of British naval participation in the Pacific in the event of war with Japan. It was generally expected that danger might develop at any moment in the Far East. R. 710.

Morison, History of United States Naval Operations in World War II, Vol. III "The Rising Sun in the Pacific" (1950) pp. 64-79;
New York Times, November 23rd and 24th, 1941.

2. On December 7, 1941, the Japanese attacked Pearl Harbor. R. 716.

1943 World Almanac, p. 52.

3. On December 8, 1941 the United States and Great Britain declared war against the Japanese Empire. R. 717.

1943 World Almanac, p. 53.

4. On December , 1941 HMS. *Prince of Wales* and HMS. *Repulse* were destroyed by Japanese aircraft off the east coast of the Malay Peninsula. The loss of these two ships together with United States losses at Pearl Harbor gave the Japanese full battle fleet command of the Pacific. The Japanese then had naval superiority which enabled them to transport troops to almost any desired point,

possess themselves of it, and establish it for an air-naval fueling base. R. 717.

Churchill, "The Grand Alliance" (1950);
1943 World Almanac, p. 53.

5. On February 23, 1942 the Prime Minister of Australia refused to consent to the diversion to the defense of Burma of a homeward-bound Australian division. R. 728.

Churchill, "The Second World War", Vol. IV, Book 1, inst. 4 N. Y. Times, October 13, 1950.

6. The disastrous series of defeats suffered by the Allies (ABDA) in Malaya, both on land and sea, led to the fall of Singapore on February 15, 1942. This was followed by the Battle of the Java Sea and Sunda Strait with the loss of USS. *Houston* and other Allied naval vessels, and the loss of the aircraft carrier USS. *Langley,* destroyed by Japanese aircraft between Australia and Java, February 27-March 1, 1942. R. 728-729.

Morison, History of United States Naval Operations in World War II—Vol. III "The Rising Sun in the Pacific", (1950) pp. 292-380;
1943 World Almanac: pp. 61-64;
Churchill, The Second World War, Vol. IV, Book 1, inst. 4 N. Y. Times, Oct. 13, 1950.

7. On March 1, 1942 the Japanese invaded the Island of Java and occupied the western part of the Island of Timor.

Before that date Timor was in the hands of Allies of the United States. R. 722, 729.

1943 World Almanac, p. 64.

8. The battle of the Coral Sea occurred on May 4-9, 1942. R. 736.

1943 World Almanac, p. 73.

APPENDIX II.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

* * *

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro